NO. 88-1164

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IN THE

# Supreme Court of the United States

October Term, 1988

THE HONORABLE PAUL A. SIMMONS, United States District Judge for the Western District of Pennsylvania,

*Pro Se Petitioner,*

vs.

JAMES MOODY, Trustee of the Estate of JEANNETTE CORPORATION, and THE COMMITTEE OF UNSECURED CREDITORS OF JEANNETTE CORPORATION,

and

ROBERT J. CINDRICH, Esquire, MANSMANN CINDRICH & TITUS, DOUGLAS A. CAMPBELL, Esquire, and CAMPBELL & LEVINE,

and

SECURITY PACIFIC BUSINESS CREDIT, INC., THE COCA COLA BOTTLING COMPANY OF NEW YORK, INC., KNY DEVELOPMENT CORPORATION, J. CORP., JOHN P. BROGAN, JOHN J. BROGAN, HANLEY DAWSON, Jr., HANLEY DAWSON, III, JAMES A. McLEAN, JAMES R. WINOKER, ROBERT M. JANOWIAK, INTERDYNE, INC., MUENCH-KREUZER CANDLE COMPANY, CALVIN McCRACKEN and FRANK W. STOREY,

and

JEANNETTE CORPORATION t/a JEANNETTE GLASS, JOHN POLOJAC and AMERICAN FLINT GLASS WORKERS UNION OF NORTH AMERICA, LOCAL NO. 535,

*Respondents.*

## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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## Questions Presented for Review

1. Did James Moody, Trustee of the Estate of Jeannette Corporation and the Committee of Unsecured Creditors of Jeannette Corporation and their Attorneys, Robert J. Cindrich, Esquire of Mansmann Cindrich & Titus, and Douglas A. Campbell, Esquire of Campbell & Levine have "legal standing" to act as Petitioners in this bankruptcy case to petition for and obtain a Writ of Mandamus from the United States Court of Appeals for the Third Circuit, directed to this United States District Judge requiring him to vacate a certain "conversion order" which this said District Judge had entered in the above-captioned bankruptcy case?

2. Assuming *arguendo* that the said Mandamus Petitioners in this case had legal "standing" to initiate this Mandamus action, should a Writ of Mandamus be issued on the facts of this case?

3. Is it proper for the Court of Appeals to issue a Writ of Mandamus where it is both legally and physically impossible for the Respondent, United States District Judge to carry out the directive set forth in the writ?

4. Should your Honorable United States Supreme Court in the sound exercise of your inherent supervisory powers over inferior Federal Courts, bar the Law Firm of Mansmann, Cindrich & Titus (headed by Jerome Mansmann) from practicing bankruptcy law in the United States Bankruptcy Courts and bankruptcy law in the United States District Court of the Third Judicial Circuit of the United States for the reason that the Honorable Carol L. Mansmann, the wife of Jerome Mansmann, and as a Judge of the United States Court of Appeals for the Third Circuit, sits on the Court which appoints all Bankruptcy Judges sitting in said Third Judicial Circuit to 14 year terms of office?

## The Parties

The *Pro Se* Petitioner for a Writ of Certiorari in this case, United States District Judge, Paul A. Simmons, seeks to have your Honorable Supreme Court review the judgment of the United States Court of Appeals for the Third Circuit, which judgment caused the issuance of a Writ of Mandamus directed to this Petitioning United States District Judge, Paul A. Simmons, directing and requiring him to vacate a certain "conversion order" that this District Judge had entered in this bankruptcy case on March 15, 1988. (See General Appendix Pages 1a and 22a, Documents A and C).

Because of the unusual complications in this case involving the alleged "lack of standing" of all of the Petitioners for the Writ of Mandamus in the Circuit Court in this case, a more complete explanation of each party's interest in this matter is very necessary in order to properly understand it. There are over 2000 Unsecured Creditors who are the real parties interested in the outcome of this case and who are not listed in the caption of this case, and a clear majority of said Unsecured Creditors are on record as officially opposing the action of the United States Court of Appeals in issuing a Writ of Mandamus against this Certiorari Petitioning District Judge. (See General Appendix page 181a, Document L.)

The parties set forth in the caption of the Writ of Mandamus (See General Appendix page 1a, Document A) that were heard by the United States Court of Appeals for the Third Circuit are also the parties who are set forth in the caption of this within Petition for a Writ of Certiorari and are more particularly described as follows:

1. The first group of listed parties in the Circuit Court below is James Moody, Chapter Eleven Trustee of the Bankrupt Estate of Jeannette Corporation who

petitioned the United States Court of Appeals for the issuance of a Writ of Mandamus and a Writ of Prohibition directed against this within Certiorari Petitioning District Judge, requesting among other matters that this District Judge be required to vacate his said "conversion order" dated March 15, 1988. (See General Appendix page 22a, Document C.) The Trustee's principal interest in this case was that he was acting as one of the plaintiffs in a suit to set aside a fraudulent conveyance filed on behalf of the bankrupt estate against the group of defendant-parties listed below in paragraph six, of the "Parties" section of this petition for a Writ of Certiorari. It is contended in this Petition for a Writ of Certiorari that said Trustee had no "standing" to have Petitioned for a Writ of Mandamus against this District Judge in the Circuit Court below.

2. The second group of listed parties in the Circuit Court below is the Committee of Unsecured Creditors of Jeannette Corporation, whose Committee members are all from a group of 882 Unsecured Trade Creditors (as distinguished from 1145 Unsecured Employee Creditors) and who also petitioned the United States Court of Appeals for the issuance of a Writ of Mandamus and a Writ of Prohibition directed against this within Certiorari Petitioning District Judge, requesting among other matters that this District Judge be required to vacate his "conversion order", dated March 15, 1988. It will be contended as an issue in this Petition for a Writ of Certiorari that said Creditors Committee had "no legal standing" to be a party plaintiff in the "fraudulent conveyance" case and that said Creditors Committee had "no standing" to be a petitioner in the Mandamus case.

3. The third group of listed parties in the Circuit Court below, are Robert Cindrich, Esquire, and the Law Firm of Mansmann, Cindrich & Titus, who are attorneys for the above-mentioned Committee of Unsecured Creditors in the action filed in the United States District

Court for the Western District of Pennsylvania on behalf of the bankrupt estate wherein it is alleged among other matters that a fraudulent conveyance should be set aside. Said attorneys have alleged in the bankrupt proceedings that they have personal financial interests in the potential recovery in said "fraudulent conveyance" litigation of 36 million dollars by virtue of a 33% contingent attorney fee interest in the proceeds of said litigation which allegedly will give said attorneys an interest in potential attorney fees up to 12 million dollars. It will be contended as an issue in this Petition for a Writ of Certiorari, that said Firm of Attorneys, Mansmann, Cindrich & Titus have no "legal standing" to be petitioners in the Mandamus case where said attorneys are acting contrary to the wishes of a majority of their unsecured creditor clients.

4. The fourth group of listed parties in the Circuit Court below, are Douglas A. Campbell, Esquire and the Law Firm of Campbell & Levine, who are attorneys for both the Trustee and the Committee of Unsecured Creditors of Jeannette Corporation as hereinbefore mentioned. Both the Trustee and the Committee of Unsecured Creditors have filed an action to set aside a "fraudulent conveyance" under the same circumstances as described for Attorneys Mansmann, Cindrich & Titus in paragraph 3 above, and in fact, the Firms of Mansmann, Cindrich & Titus and Campbell & Levine are co-counsel to the "fraudulent conveyance litigation", and both firms of attorneys admit to personal financial interests in the potential recovery of 36 million dollars by virtue of the hereinbefore-referred to 33% contingent attorney fee interest in the said proceeds of said litigation which allegedly will give the Mansmann, Cindrich & Titus and Campbell & Levine Firm a joint interest in a potential attorney fee of up to 12 million dollars. (See Appendix pages 71a-73a at page 338 of Document D.) It will be contended as an Issue in this Petition for a Writ of Certiorari that said Firm of

Attorneys, Campbell & Levine, have "no legal standing" to be petitioners in the Mandamus case where said attorneys are acting contrary to the wishes of a majority of their unsecured creditor clients.

5. The fifth group of listed parties in the Circuit Court below and the within Petition for the Writ of Certiorari is the United States District Judge, Paul A. Simmons, who was the Respondent in the Mandamus action below and who was directed by the United States Court of Appeals to vacate his "conversion order" of March 15, 1988. Contrary to the caption of the Mandamus action in the United States Court of Appeals, Judge Simmons is *not* a Nominal Respondent because as will be discussed later in greater detail, this Judge has been ordered to vacate his "conversion order" when it was at all relevant times legally and physically impossible for him to do so because on March 30, 1988, almost six months prior to the issuance of the Writ of Mandamus on September 26, 1988, this District Judge recused himself from said bankruptcy case, which case was immediately reassigned to another Judge. In order to avoid the serious consequences of being placed in contempt of Court, this District Judge is herein petitioning for this Writ of Certiorari.

6. The following group of listed parties in the Circuit Court below are also defendants in the "fraudulent conveyance litigation", and these defendants are not Unsecured Creditors of the bankrupt and they have no direct legal interest of any kind in the "conversion order" issued by this District Judge. These parties have no "legal standing" to participate in the Certiorari proceeding now before your Honorable Supreme Court since they are not at all involved in the administration of the bankrupt's estate. The Fraudulent Conveyance Litigation Defendants are: Security Pacific Business Credit, Inc., The Coca Cola Bottling Company of New York, Inc., KNY Development Corporation, J. Corp., John P. Brogan, John J. Brogan, Hanley Dawson, Jr.,

Hanley Dawson, III, M. Janowiak, Interdyne, Inc., Muench-Dreuzer Candle Company, Calvin McCracken and Frank W. Storey.

7. The seventh listed group of parties in the Circuit Court below are:

A. Jeannette Corporation, t/a Jeannette Glass, debtor in the reorganization proceeding under Chapter 11 of the Bankruptcy Code and debtor in the dissolution proceeding under Chapter 7 of the Bankruptcy Code.

B. John Polojac and American Flint Glass Workers Union of North America, Local No. 535. Mr. Polojac and the Union represent real parties in interest namely 732 active employees of the debtor and 206 retirees of the debtor for a total of 938. (There are 207 unrepresented employee-retirees, and there is a total of 1145 active and retired employees who are unsecured creditors. The 938 employee-retiree claims, represented by the Union which are a majority of all of the outstanding unsecured claims, opposed the Court of Appeals granting the Writ of Mandamus against this District Judge and they filed an Answer to the Petition for a Writ of Mandamus with the Clerk of the United States Court of Appeals for the Third Circuit. (See General Appendix page 181a, Document L.)

In fact, *all* of the classes of Unsecured Creditors, who are the real parties in interest in this matter are also represented by attorneys other than Campbell & Levine and Mansmann, Cindrich & Titus in matters involving the administration of the bankrupt estate. 1145 active and retired employees who are Unsecured Creditors of the bankrupt with potential claims exceeding over sixteen million dollars are represented by Attorney Philip Beard; the 882 Unsecured Trade Creditors with claims exceeding four million dollars are represented by Attorney David Humphreys; the Pension Benefit Guaranty Corporation (PBGC) with claims exceeding seven million dollars are represented by Attorney Angie

Arnett, and the "Calvin D. McCracken" claim exceeding twenty-nine million dollars is represented by Attorney Grace Harris.

These above-referred to classes of Unsecured Creditors have conflicting legal and financial interests and there is no proper and ethical way (as noted in this District Court's Opinion, See General Appendix pages 104a to 140a, Document D at pages 352 to 366, inclusive), for Attorneys Campbell & Levine and Mansmann, Cindrich & Titus to represent the conflicting legal and financial interests of these different classes of Unsecured Creditors in this Appellate action now before your Honorable Supreme Court. Further, Mansmann, Cindrich & Titus had authority to prosecute only the "fraudulent conveyance litigation" and they have no authority of any kind whatsoever to represent any of the classes of Unsecured Creditors on the issue of converting the bankruptcy proceeding from Chapter 11 to Chapter 7, in the District Court and said attorneys presently have no authority of any kind whatsoever to represent any of the Unsecured Creditors in this certiorari matter now before your Honorable Supreme Court. (See General Appendix page 143a, Document E; page 149a, Document F; page 156a, Document G; and page 160a, Document H.) Not one party has appealed this District Judge's "conversion order".

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IN THE

# Supreme Court of the United States

**October Term, 1988**

**No._____**

THE HONORABLE PAUL A. SIMMONS, United States District Judge for the Western District of Pennsylvania,

*Pro Se Petitioner,*

vs.

JAMES MOODY, Trustee of the Estate of JEANNETTE CORPORATION, and THE COMMITTEE OF UNSECURED CREDITORS OF JEANNETTE CORPORATION,

and

ROBERT J. CINDRICH, Esquire, MANSMANN CINDRICH & TITUS, DOUGLAS A. CAMPBELL, Esquire, and CAMPBELL & LEVINE,

and

SECURITY PACIFIC BUSINESS CREDIT, INC., THE COCA COLA BOTTLING COMPANY OF NEW YORK, INC., KNY DEVELOPMENT CORPORATION, J. CORP., JOHN P. BROGAN, JOHN J. BROGAN, HANLEY DAWSON, JR., HANLEY DAWSON, III, JAMES A. McLEAN, JAMES R. WINOKER, ROBERT M. JANOWIAK, INTERDYNE, INC., MUENCH-KREUZER CANDLE COMPANY, CALVIN McCRACKEN and FRANK W. STOREY,

and

JEANNETTE CORPORATION t/a JEANNETTE GLASS, JOHN POLOJAC and AMERICAN FLINT GLASS WORKERS UNION OF NORTH AMERICA, LOCAL NO. 535,

*Respondents.*

## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

## Statement of Jurisdiction

### District Court Jurisdiction

This civil matter now before your Honorable Supreme Court for review involves the Bankrupt Estate of Jeannette Corporation. This Bankruptcy matter which involved a motion to convert the bankrupt's estate from Chapter Eleven of the United States Bankruptcy Code to Chapter Seven of the United States Bankruptcy Code is governed by the provisions of the Bankruptcy Act of 1978. (The new Act of July 10, 1984, 98 Stat. 333.)

The relevant sections of the new Bankruptcy Act applicable to this case are:

Title 11 U.S.C. Section 1112—Conversion or Dismissal. (See Statute Appendix II Exhibit No. 1, page 223a.)

Title 11 U.S.C. Section 327, Employment of Professional Persons. (See Statute Appendix II Exhibit No. 3, page 226a.)

Title 11 U.S.C. Section 348—Effect of Conversion. (See Statute Appendix II Exhibit No. 2, page 225a.)

The Motion to Convert the underlying bankruptcy proceeding in the above-captioned case from Chapter 11 to Chapter 7, was filed by John Polojac and the American Flint Glass Workers Union of North America, Local No. 535 (hereinafter called "Union"), in the United States Bankruptcy Court for the Western District of Pennsylvania, at Bankruptcy Case No. 82-3265, and Bankruptcy Motion No. 87-531 (See General Appendix page 169a, Document I), and the motion was withdrawn to the United States District Court for the Western District of Pennsylvania by order of this District Court Judge, dated March 10, 1987. (See United States District Court, Civil Action No. 83-2383, at Doc. Entry No. 385.) This Chapter 11 case was originally filed on October 4, 1982, as a Chapter 7 case and was converted to a Chapter 11 case by order of the Bankruptcy Court, December 10, 1982. (See Bankruptcy Docket Entry Nos. 1 and 23.)

By an order of this District Court Judge (Certiorari Petitioner herein) dated March 15, 1988 (Hereinafter referred to as the "conversion order"), this bankruptcy case (Jeannette Corporation) was converted from a Chapter 11 case to a Chapter 7 case. (See General Appendix page 22a, Document C for the "conversion order".) [(Also see General Appendix page 29a, Document D, beginning at page 321 *et seq.* of Document D), for the Findings of Fact, Conclusions of Law and Order as printed in 85 B.R. 319 (W.D. Pa. 1988).]

Jurisdiction in this case was properly in the United States District Court for the Western District of Pennsylvania pursuant to 28 U.S.C. Section 1331, which reads, "The District Court shall have original jurisdiction of all civil actions arising under the Constitution, *laws* or treaties of the United States."

See also *Northern Pipeline Construction Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 102 S.Ct. 2858, 73 L.Ed. 2d, 598 (1982).

**Court of Appeals Jurisdiction**

Jurisdiction was properly in the Court of Appeals for the Third Circuit in regard to entertaining the Petitions for a Writ of Mandamus and Writ of Prohibition of James Moody, Trustee; The Committee of Unsecured Creditors of Jeannette Corporation, Robert J. Cindrich, Esquire; Mansmann, Cindrich & Titus; Douglas A. Campbell, Esquire and Campbell & Levine (See General Appendix page 1a and page 4a, Documents A and B), addressed to this Certiorari Petitioning District Judge and requesting said Third Circuit Court to direct this Certiorari Petitioning District Judge to vacate the aforementioned "conversion order" and the District Court's supporting "findings of fact", is authorized by Title 28 U.S.C. Section 1651. (For text See Statute Appendix II Exhibit No. 9, page 230a) and the Federal Rules of Appellate Procedure Rule 21—Writs of Mandamus and Prohibition directed to a Judge or Judges, etc. (For text of Rule 21, See Statute Appendix II Exhibit No. 10, page 231a.)

The Circuit Panel in the aforementioned Mandamus Action was of the belief that the threshold question before it was whether this Certiorari Petitioning District Judge's Bankruptcy Court Orders that were entered after this District Judge announced his intention to recuse himself from the above-captioned bankruptcy case at some time in the future, must be set aside pursuant to 28 U.S.C. Section 455(a). (See Statute Appendix II Exhibit No. 4, page 227a. See also Title 28 U.S.C. Section 144, Statute Appendix II Exhibit No. 5, page 227a.)

There is no doubt that the United States Court of Appeals had the proper jurisdiction to address the legal and factual issues that arose out of its judicial construction of 28 U.S.C. 455(a). See *Liljeberg v. Health Services,* 486 US _____, 100 L.Ed. 2d 855, 108 S. Ct. 2194 (1988).

The United States Court of Appeals for the Third Circuit on September 26, 1988, issued a Writ of Mandamus (supported by a reported Opinion (See Copy of Opinion, General Appendix page 4a, Document B)), addressed to this Certiorari Petitioning District Judge directing him to vacate his "conversion order" and also to vacate the "supporting findings for said conversion order". (See General Appendix page 1a, Document A, for Writ of Mandamus). On October 20, 1988, a Petition for Rehearing *en Banc* was denied. (See General Appendix page 220a, Document N.)

**Supreme Court of the United States Jurisdiction**

This Certiorari Petitioning United States District Judge in filing this Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit to allow your Honorable Supreme Court to review the legal propriety of said Writ of Mandamus issued against this District Judge is invoking Title 28 U.S.C. Section 1254(1), which reads (See Statute Appendix II Exhibit No. 7, page 230a):

> "1254. Courts of appeals; certiorari; appeal certified questions

Cases in the Courts of Appeals may be reviewed by the Supreme Court by the following methods:

(1) By writ of certiorari granted upon the petition of *any* party to *any civil* or criminal case, before or after rendition of judgment or decree."

Your Certiorari Petitioning United States District Judge, Paul A. Simmons, is personally a legally interested named party involved in the Mandamus action sought to be reviewed by your Honorable Supreme Court and this District Judge is not in any way a nominal respondent for the following reasons:

(a) 28 U.S.C. Section 1254(1), grants "*any party* to *any civil case*" the unfettered right to file a Petition for a Writ of Certiorari to your Honorable Supreme Court and your Certiorari Petitioning United States District Judge is in fact a named Respondent Party against whom the Writ of Mandamus of the Third Circuit Court of Appeals is directed.

(b) Your Certiorari Petitioning United States District Judge, Paul A. Simmons herein (for a number of legal reasons which will be discussed in detail in the body of this Petition for a Writ of Certiorari) is requesting your Honorable Supreme Court to review and reverse an order of the United States Court of Appeals for the Third Circuit wherein a Writ of Mandamus (See General Appendix page 1a, Document A for a copy of said Writ of Mandamus) was issued by said Circuit Court, directing this Certiorari Petitioning District Judge to vacate a certain bankruptcy "conversion order" dated March 15, 1988. (See General Appendix page 22a, Document C for a copy of said conversion order.)

One of the assigned reasons for requesting a reversal of the Circuit Court is that it is legally and physically impossible for this Certiorari Petitioning District Judge to obey and carry out the directives of said Writ of Mandamus, because on March 30, 1988, almost six months prior to the issuance of said Writ of Mandamus dated September 26, 1988, this Certiorari Petitioning

District Judge had recused himself from said case, which case was immediately reassigned to another District Judge.

In order to avoid the serious consequences of being placed in an impossible dilemma of being held personally in contempt of the Circuit Court and with no legal way of purging said contempt, it is clear that this Certiorari Petitioning District Judge has a clearly personal, legally protected interest in appealing the unlawful Writ of Mandamus Order via a Petition for a Writ of Certiorari in order to avoid a possible citation for contempt of the Circuit Court.

(c) Although this Certiorari Petitioning District Judge might be considered to be an "Officer of the United States" within the meaning of Title 28 U.S.C. Sections 516, 517, 518 and 519 (See Statute Appendix II Exhibit Nos. 6(a), 6(b), 6(c) and 6(d), pages 228a, 229a) thereby reserving to the United States Department of Justice, the right to conduct this requested review of the action of the Circuit Court in issuing a Writ of Mandamus against this Certiorari Petitioning District Judge, it is clear that the Department of Justice has no justiciable interest in this within Petition for a Writ of Certiorari for the following reasons:

1. Because this Certiorari Petitioning District Judge is actually a named party in this case and is a party who has a real and definite personal legal interest in the outcome of this case, this Certiorari Petitioning District Judge clearly is included in the language "any party" in Title 28 U.S.C. Section 1254(1) and therefore this District Judge has an absolute and unconditional right to Petition your Honorable Supreme Court for a Writ of Certiorari in this case. (For the statutory language of 28 U.S.C. Section 1254(1) See Statute Appendix II Exhibit No. 7, page 230a.)

2. Because this Certiorari Petitioning District Judge is absolutely entitled, as a named party, to petition for a Writ of Certiorari, pursuant to 28 U.S.C.

Section 1254(1), this within Petition for a Writ of Certiorari now before your Honorable Supreme Court is specifically excluded from the language and applicability of Title 28 U.S.C. Sections 516, 517, 518 and 519 (See Statute Appendix II Exhibit Nos. 6(a), 6(b), 6(c) and 6(d), pages 228a, 229a) by the expressed prefatory language in Sections 516 and 519, "Except as otherwise authorized by law, . . .".

3. The United States is not a party to this within Certiorari proceeding, and has no interest in this proceeding and is not, has not and will not be engaged in securing evidence in regard to this matter.

4. Further, this Certiorari proceeding pending now before your Honorable Supreme Court was not initiated to vindicate the judicial power of the United States under Article III of the United States Constitution as was the case in *United States v. Providence Journal Co.*, 485 US _____, 99 L.Ed. 2d 785, 108 S.Ct. 1502 (decided May 2, 1988), where a Special Prosecutor who by definition is "of counsel" to the United States and represents the public interest and where alleged criminal conduct was involved and where the special prosecutor was actively pursuing a contempt action to vindicate the power of the Federal Government to deal with criminal matters. (See also *Barry v. United States,* 528 F.2d 1094, 1099 (7th Cir. 1976).) This Certiorari case now before your Honorable Supreme Court is a civil matter wherein as of this time, there has been no attempt to enforce the provisions of the Writ of Mandamus issued against this Certiorari Petitioning Judge by contempt proceedings or otherwise because of this pending Petition for a Writ of Certiorari.

5. Further, in the case of *United States vs. Providence Journal,* cited *supra,* the special prosecutor who himself was *not* a party to the case, sought authorization from the United States Solicitor General to file a petition in the United States Supreme Court for a Writ of Certiorari. The Solicitor General denied the requested authorization, so the Special Prosecutor on his own initiative filed a Petition for a Writ of Certiorari,

briefed and argued said Providence Journal case (cited *supra*) for and on behalf of the United States Government and specifically in the name of the United States Government with the United States Government actually as a named party, without the authorization of the Attorney General. In this Certiorari case now pending before your Honorable Supreme Court, the primary issue involves the interpretation of the law of judicial disqualification in a private civil bankruptcy matter. Legal matters pertaining to judicial disqualification in specific civil legal cases such as are involved in this Certiorari case now before your Honorable Supreme Court, are matters peculiarly and exclusively within the inherent power of the your Honorable Supreme Court to control the conduct of its inferior Judges and is not a matter that is of general legal interest to the Attorney General in the Executive Branch of the Government.

6. In the case of *Liljeberg v. Health Services*, 486 US _____, 100 L.Ed. 2d 855, 108 S.Ct. 2194, which was decided June 17, 1988, about one month *after* the Providence Journal case (cited *supra*) your Honorable Supreme Court addressed the Fifth Circuit's construction of the law pertaining to the disqualification of Federal Judges pursuant to 28 U.S.C. 455(a), which is the identical subject now being presented to your Honorable Supreme Court for review by virtue of this Certiorari Petitioning District Judge, and your Honorable Supreme Court granted certiorari and decided said issue in said *Liljeberg* case without any intervention of any kind by the United States Department of Justice.

7. In summary, it is clear in light of *Liljeberg v. Health Services, Inc.*, cited *supra*, that your Honorable Supreme Court has the inherent supervisory power and unfettered jurisdiction to address the Third Circuit's construction of 28 U.S.C. Section 455(a) as said statute pertains to the disqualification of this Certiorari petitioning District Judge on the facts of the within civil case.

**Statement of the Case**

This is the first case in recorded legal history where an Appellate Court (Third Circuit Court of Appeals) has issued a writ of mandamus which has the direct and actual legal effect of placing the imprimatur of approval on the advancement of the personal financial interests of the Mandamus Petitioning Committee of Unsecured Creditors, the Mandamus Petitioning Trustee and the Mandamus Petitioning Attorneys in the above captioned case to the legal detriment and legal disadvantage of the majority of the unsecured creditors, who are the real parties in interest that said Committee, Trustee and Attorneys have a legal duty to properly represent. (See discussion on Ethical issues, General Appendix page 104a to page 140a; Document D, *i.e.*, pages 352 to 366 inclusive of Document D.)

The true and undisputed facts up to and including January 29, 1988, are that the Trustee, James Moody, was appointed trustee on July 27, 1983, and at paragraph 12 of said order, both trustee and the Committee of Unsecured Creditors were simultaneously given the right to engage counsel and pursue the "fraudulent conveyance litigation" where it is stated (General Appendix page 147a, paragraph 12 of Document E), the following:

> "12. That the Application of the Committee of Unsecured Creditors to engage co-counsel and have a standing to sue are hereby approved; and that a confirming order shall be entered upon presentation of same by the Committee of Unsecured Creditors and/or its counsel. The trustee is deemed to have joined in the application to engage co-counsel, and shall join the Committee of Unsecured Creditors as co-plaintiff in the actions contemplated in the application for standing to sue."

On the next day, July 28, 1983, strange actions on the part of the Bankruptcy Judge occurred.

1. The Bankruptcy Judge signed an Order (7-28-83) without a cost-benefit hearing (General Appendix page 160a, Document H), permitting the Committee of Unsecured Creditors to engage the law Firms of Campbell & Levine, and Mansmann, Cindrich & Huber to pursue the "fraudulent conveyance litigation: on a 33% contingent fee basis. This order, without a time-stamp, was filed with the Clerk on July 29, 1983.

2. The Bankruptcy Judge on the same day, signed a second order (7-28-83) (General Appendix page 156a, Document G), without a "cost benefit hearing", granting the Committee of Unsecured Creditors the right to sue in regard to the "fraudulent conveyance litigation". This order, without a time-stamp, was filed with the Clerk on July 29, 1983.

3. The Bankruptcy Judge on the same day, signed a third order (7-28-83) (General Appendix page 149a, Document F), without a "cost benefit hearing", granting the trustee the same right to engage Campbell & Levine only as counsel, (Mr. Cindrich, etc. was omitted) only for the purpose of allowing the trustee to pursue the same "fraudulent conveyance litigation" referred to immediately above in Documents G and H. Paragraph 2 of Document F, General Appendix page 150a, in relevant part states:

> "2b To appear for, prosecute, defend and represent applicant's interest in suits arising in or related to this case."

Petitioners in the Mandamus action at page 10 of their final submission, freely confess that: "Since that time, (July 28, 1983) Campbell and Levine has represented the Creditors' Committee only in the capacity of special litigation counsel, (along with the firm of Mansmann, Cindrich & Titus in connection with the District Court action, "fraudulent conveyance litigation").

The Bankruptcy Judge knew that it was legally wrong and improper to grant the application of the Committee of Unsecured Creditors to engage Mansmann, Cindrich & Huber (Titus) co-counsel on 33% contingency basis with Standing to Sue as a co-plaintiff in the "fraudulent conveyance" case, and that all three of these orders dated July 28, 1983 are and were void *ab initio* and of no legal force or effect, since the Trustee alone at that time as of July 27, 1983 (Document E, General Appendix page 143a), was the only party with proper standing to bring suit to void the alleged "fraudulent conveyance."

The late Bankruptcy Judge who signed these orders of July 27, 1983 and July 28, 1983, knew full well that a Creditor's Committee is allowed to initiate legal proceedings *only* when the Trustee or Debtor in possession unjustifiably fails to bring a necessary law suit and/or has abused its discretion in not suing to avoid a preferential transfer, because this very Bankruptcy Judge who signed these three orders of July 28, 1983 as above noted, had so ruled in the case of *In re: Monsour Medical Center,* 5 Bankry. 715, 718 (Bankry, W.D. Pa. 1980). In fact, the *Monsour* case was cited with approval on the same point of law (*In re: STN Enterprises,* 779 F.2d 901, 904 (2d Cir. 1985) when the Court of Appeals for the Second Circuit held unequivocally that the Creditor Committees are allowed to initiate legal proceedings *only* when the Trustee or Debtor in possession unjustifiably fails to bring suit or abused its discretion in not suing to avoid a preferential transfer.

Every recorded case on the subject has held that the Trustee-Plaintiff in bankruptcy matters such as the "fraudulent conveyance litigation" involved in this case does not need the additional and superfluous assistance of another plaintiff such as the Committee of Unsecured Creditors to prosecute such "fraudulent conveyance litigation" for the reason that such Creditors' Committee is unnecessary and has no standing to join in and

participate in said litigation where a Trustee has been appointed as in this case, and where said Trustee is in fact prosecuting said litigation. However, the Trustee Moody and his attorneys Campbell and Levine are removed from the bankruptcy case and the "fraudulent conveyance litigation" automatically when the bankruptcy case is converted from Chapter 11 to Chapter 7, of the Bankruptcy Code by virtue of Title 11, USC Section 348(e). (See Statute Appendix II Exhibit No. 2, page 225a.) A new Trustee would be appointed in the Chapter 7 proceeding, but the Committee of Unsecured Creditors would be eliminated altogether.

It is uncontested that if the "conversion order" were *not* vacated, the present plaintiffs in the "fraudulent conveyance litigation", namely Moody, the Trustee, and the Committee of Unsecured Creditors and their respective attorneys would be removed from this bankruptcy case and the "fraudulent conveyance litigation" by operation of law.

The motive of the above described four groups of Mandamus Petitioners to have this Certiorari Petitioning District Judge's "Conversion Order" vacated in the Circuit Court below via a Writ of Mandamus, is obvious. If said "Conversion Order" is *not* vacated and if Moody is not reappointed as the new Chapter 7 Trustee, Moody and all of the above described attorneys will lose potential accounting, Trustee and attorney fees in excess of twelve million dollars.

To allow said Mandamus Petitioners to succeed in collaterally attacking this Certiorari Petitioning District Judge's "Conversion Order" under the guise of an alleged judicial disqualification and against the wishes of a majority of the unsecured creditors who petitioned for the "conversion order" and who are the real parties in interest, amounts to condoning an abuse of the legal process and is a perversion of justice.

It is admitted by all interested parties that the debtor's operations were completely shut down shortly after the conversion of the case from the Chapter 7 on December 10, 1982 to Chapter 11; and said glass business has not operated since. All of the debtor's land, building, machinery, equipment, and all other assets that would be required to operate its former glass manufacturing business were sold in September of 1983. As of October 31, 1986, all of the debtor's assets were converted to cash with the exception of a cause of action which the Trustee has filed against Security Pacific Business Credit, Inc., *et al.*, in the United States District Court, C. A. No. 83-2382 (the above-captioned case), alleging a "fraudulent conveyance." Since October 31, 1986, the only activity in this bankruptcy case has been the pursuit of that "fraudulent conveyance" cause of action.

On February 2, 1987, John Polojac and the American Flint Glass Workers of North America, Local No. 535, on behalf of 1145 active and retired employee Unsecured Creditors of the Bankrupt moved the Bankruptcy Court to reconvert the bankruptcy proceeding from Chapter Eleven to Chapter Seven. (See General Appendix page 169a, Document I.) On March 10, 1987, this Certiorari Petitioning Judge entered an Order withdrawing the reference from the Bankruptcy Court. On January 6, 1988, the Trustee filed a formal Motion requesting this District Judge to extend the "bar date" in lieu of converting the proceeding from Chapter Eleven to Chapter Seven. (See General Appendix page 172a, Document J.) This Motion by the Trustee was filed despite the objections of a majority of the Unsecured Creditors and the Trustee obviously had a serious conflict of interest when he filed said motion to extend said "bar date", against the declared financial interests of the majority of the Unsecured Creditors that said Trustee agreed under oath to represent.

Title 11, U.S.C. Section 1112(b) of the Bankruptcy Code, addresses this "conversion issue". See 11 U.S.C. 1112(b) of the United States Bankruptcy Code which outlines what elements a party in interest must establish in order to convert a Chapter 11 Reorganization into a Chapter 7 Liquidation. (See Statute Appendix II Exhibit No. 1, page 223a.)

This District Judge set January 29, 1988, as the time to hear arguments on said "conversion motion" and at that time all of the classes of Unsecured Creditors who are the real parties in interest in this matter were and are represented by attorneys other than Mandamus Petitioning Attorneys, Campbell & Levine and Mansmann, Cindrich & Huber (Titus), and this District Judge is advised and believes that none of these other attorneys (listed above in "Parties"), were informed of and/or consented on behalf of their clients to the filing of this Petition for a Writ of Mandamus with the United States Court of Appeals against this District Judge.

In an obvious effort to prevent this District Judge from ruling on the "conversion issue" the Trustee's attorney sent a letter to this District Judge several days prior to the January 29, 1988, hearing date, suggesting that this Judge may have a conflict of interest in the case because this Judge's daughter worked for Mellon Bank, one of Debtor's Jeannette's Corporation's 882 Unsecured *Trade* Creditors. After nearly five years on this very complex case, this was the first notice that this District Judge received that Mellon Bank had an interest in this case.

The Circuit Panel Statement (Page 9 of Slip Opinion, General Appendix page 12a, Document B), that "*the (District) Judge reiterated his position that recusal was necessary in order to avoid the appearance of impropriety*", had reference to the need for recusal in the future, not for the need for recusal at the present time. This District Judge clearly stated that recusal would be

necessary in the future and only after the "conversion" matter had been addressed. The "conversion order" entered by this District Court was not at all in Mellon Bank's interest and there was absolutely no appearance of impropriety when said conversion order was entered.

At page 5 to 8, inclusive, of the hearing transcript of January 29, 1988, this District Judge said the following among other statements:

> *"I think that after about three or four years, and hours and hours of work on this matter, I think it would be a sacrifice of much judicial effort and would be contrary to the whole idea of judicial economy if I were not to address the main problems here today, which, as I say, don't and won't . . . I can guarantee you, there is no impact in any way on the financial interest of Mellon, one way or other, as I view it".*

Further, this District Judge recalls some mention of the fact that some lawyers before him were also defending a law suit in which this District Judge was a party.

This District Judge clearly felt and expressed on the record that none of these matters were of sufficient substance to warrant an instant recusal. As to legal issues that could be raised in the future, perhaps this District Judge's impartiality could be reasonably questioned, but not as of January 29, 1988.

Mellon as an "Unsecured Trade Creditor" was represented at the January 29, 1988, hearing by David Humphrey and the lawyers who were involved in a case in which this Judge was a party, apparently were also present in the Courtroom. (This District Judge was never advised as to the identity of said attorneys.) If any of these affected parties and/or attorneys were in doubt about this District Judge's impartiality, they had over forty-five days prior to the date of the "conversion order" of March 15, 1988 (General Appendix page

22a, Document C), to move for this Judge's recusal pursuant to 28 U.S.C. Section 455. *No recusal motion was ever filed in this case, up to this very time,* and looking back as a matter of fact in hindsight, every party, directly affected by the "conversion order" including the Petitioners in the Mandamus matter, agree that this District Judge was not guilty of abusing his discretion and no party has suggested that this District Judge acted in an impartial, arbitrary or capricious manner in entering the "conversion order" in this District Court.

This Certiorari Petitioning United States District Judge entered the "conversion order" (See General Appendix page 22a, Document C) along with Findings of Fact, Conclusions of Law and Opinion in support of said "conversion order". (See General Appendix page 26a, Document D.)

The Mandamus Petitioners (See Section on "parties" *supra*) filed a Petition for Mandamus and Writ of Prohibition against this District Judge requesting that the Circuit Court direct this Judge to vacate his findings, opinion and "conversion order". (See record in the Circuit Court below.)

The Mandamus Petitioners filed a second Petition to modify the first Petition. (See record in the Circuit Court below.)

This District Judge answered both of said Petitions. (See record in the Circuit Court below and General Appendix page 176a, Document K.)

This District Judge at the direction of the Court of Appeals filed a second Answer to said Petition for Mandamus. (See General Appendix page 176a, Document K.)

John Polojac and the American Flint Glass Workers Union of North America, Local No. 535, who represented a majority of all of the "Unsecured Creditors", filed an

Answer opposing the issuance of said Writ of Mandamus. (See General Appendix page 181a, Document L.)

Security Pacific Business Credit, Inc., who was not an Unsecured Creditor and who was a defendant in the "fraudulent conveyance" case and who had at most a "tangential" interest in the "conversion order", filed an Answer to said Mandamus Petition. (See Record in the Circuit Court below.)

The Third Circuit Court of Appeals granted the request for a Writ of Mandamus (even though a motion for the recusal of this District Judge was never filed) on the ground that once this District Court said that his impartiality could reasonably be questioned,[1] that this Judge should have recused at that time and that this Judge was not empowered to perform judicial functions thereafter pursuant to Title 28 U.S.C., Section 455(a). (See Statute Appendix II Exhibit No. 4, page 227a; See General Appendix pages 1a and 4a, Documents A and B.)

This Certiorari Petitioning District Judge filed a Petition for Rehearing *En Banc* before the United States Court of Appeals for the Third Circuit with accompanying Appendix, which was refused on October 20, 1988. (See General Appendix page 220a, Document N.)

This Certiorari Petitioning District Judge is herein now Petitioning your Honorable Supreme Court to review the action of the Court of Appeals of the Third Circuit in issuing said Writ of Mandamus against this District Judge.

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[1] This District Court was clearly referring to the future and not to the time of entry of the "conversion order" and this District Judge considered himself to be disqualified only as to matters that would be decided after March 30, 1988.

## REASONS FOR GRANTING THE WRIT

### Discussion of the First Question Presented

It is submitted that not one of the Mandamus Petitioners in the Circuit Court had "standing" to petition for and obtain a Writ of Mandamus against this Certiorari Petitioning District Judge requiring him to vacate his bankruptcy "conversion order" that he had entered in this case.[2]

Although the Circuit Panel was formally requested to directly address this "standing" question on three different occasions,[3] it declined to do so. (See General Appendix page 176a, Document K.) However by a clear and unmistakable implication, the Circuit Panel has erroneously held that all of said Mandamus Petitioners had "standing" in said action to petition for a Writ of Mandamus.

As to the "standing" of the Committee of Unsecured Creditors, the cases of *In the Matter of Monsour Medical Center, et al.*, 5 BR 715 (1980) W.Dist. of Pa; *In Re STN Enterprises*, 779 F.2d 901, 904 (2nd Cir. 1985); *Matter of Xonics Photo Chemical, Inc.*, 841 F.2d 198, 202 (7th Cir. 1988), hold that where a trustee has been appointed to conduct bankruptcy fraudulent conveyance litigation, (See General Appendix page 147a, Document E, paragraph 12 and General Appendix page 150a, Document F, paragraph 2b), and enters in upon the conduct of said litigation, the Bankruptcy Court appointment of a Committee of Unsecured Creditors and their attorneys to aid the Trustee in said litigation is of no legal effect. Because the Appointment of the Committee of Unsecured Creditors and their attorneys is

[2] The question of "standing", *i.e.* whether a litigant is entitled to have the Court decide the merits of the dispute is fundamental to the matter of Federal Jurisdiction. (See generally the Federal Court and the Federal System Third Ed. 1988, at page 110, by Hart & Wechsler).

[3] The "standing" question was specifically raised in this Certiorari Petitioning Judge's First Answer, Second Answer, and the Petition for Rehearing *en Banc*.

in legal effect void *ab initio,* said Committee of Unsecured Creditors and their Attorneys Mansmann, Cindrich & Huber and Campbell & Levine have no "standing" to participate in this bankruptcy case in any way whatsoever, including the Mandamus action.

The Trustee Moody and his Attorneys, Campbell & Levine cannot properly intervene or have "standing" to litigate the conversion of the bankruptcy case to Chapter 7 because: "The Trustee appointed in a corporate reorganization proceeding is not concerned with the merits of a Petition for reorganization or its dismissal, and hence is not entitled to appeal from a decree of dismissal." (See *Loomis v. Gila County,* 101 F.2d 827, 103 F.2d 312; petition for rehearing denied. (9th Cir.).

To resolve this clear conflict on the law of Bankruptcy in the Second, Seventh and Ninth Circuits with the Third Circuit, the Writ of Certiorari should issue in this case.

Even if it is assumed *arguendo* that the Committee of Unsecured Creditors was a proper party in the "fraudulent conveyance litigation", said Committee and the Trustee still would have no "standing" to collaterally attack this District Judge's "conversion order" via a Petition in Mandamus. The Committee of Unsecured Creditors and the Trustee are duty bound to represent the interests of all the Unsecured Creditors impartially. In this case, 1145 employee Unsecured Creditors are in favor of this District Judge's Order of Conversion, and 882 of the Unsecured Creditors are opposed to said "conversion order". It is impossible for the Committee of Unsecured Creditors and the Trustee to represent these conflicting interests impartially, fairly and properly. In this case, the Committee of Unsecured Creditors and the Trustee are, through a Mandamus action, favoring all of the Unsecured trade creditors at the economic expense of the unsecured employee creditors. It is noteworthy to point out that all of the members of the Unsecured Creditor Committee are "trade creditors" and the "employee creditors" are not represented on said committee.

At the District Court level, the Union on behalf of the interested employee Unsecured Creditors moved to convert the Bankruptcy Chapter 11 case to Chapter 7. (See General Appendix Page 169a, Document I.) The Trustee opposed the Union's motion by moving the District Court to extend the bar date in lieu of conversion. (See General Appendix Page 172a, Document J.) The practical effect of the Writ of Mandamus which directs this Court to vacate the "conversion order" is to protect the financial interests of the trade creditors, and the Trustee's fees and their attorneys' potential twelve million dollar legal fee at the expense of the majority of the creditors, namely the employee unsecured creditors.

The Third Circuit in an Opinion filed on November 23, 1988, and since the Opinion filed in this case at bar on September 26, 1988, now holds (contrary to the holding in the within case), that where two groups of interested parties have conflicting interests in the outcome of pending litigation, the District Court must deny "*Jus Tertii* standing" to any one Plaintiff or entity who wishes to simultaneously represent all of the conflicting interests of the group under those circumstances. In the case at bar, 882 unsecured trade creditors are opposed to the "conversion order", while a majority 1145 unsecured employee creditors support this District Court and are in favor of said "conversion order". Under these circumstances, the within Mandamus Petitioners would have no lawful "*Jus Tertii* standing" to purport to represent all of the "unsecured creditors and to move for said "conversion order" to be vacated at the expense of the majority of said unsecured creditors who are in favor of "conversion". See *Polaroid Corporation v. Disney, et al.*, (unreported Third Circuit slip opinion dated 11-23-88). For relevant excerpts (See General Appendix Page 207a, Document M, which in legal effect reverses this Circuit decision in the case at bar.) Judge Becker wrote the opinions in both cases.

The Third Circuit has already reversed the law in the case at bar, in less than six weeks and has so far departed from customary judicial practices, that a review of its actions on this "standing" issue by Writ of Certiorari should be granted.

As noted earlier in this Petition, the only real interest that the Mandamus Petitioners have in this case is to protect their potential professional fees in excess of twelve million dollars. In this case, the Mandamus Petitioning Attorneys have openly admitted to having a vested personal financial interest in this bankruptcy case, and they have freely admitted that this District Court Judge did not abuse his discretion when he entered the "conversion order".

The Bankruptcy Code is clear at Title 11 U.S.C. Section 327 (See Statute Appendix II Exhibit No. 3, page 226a) and the applicable case law is clear that if said Mandamus Petitioner Attorneys claim a beneficial interest of any kind in the bankrupt's estate, they must be dismissed as attorneys in the bankruptcy case and they are completely disqualified from advancing their special financial interest as Mandamus Petitioners while employed by the bankrupt estate. These Mandamus Petitioner Attorneys are also prevented from having "standing" to file said Mandamus Petition by the Pennsylvania Code of Professional Responsibility then in effect at the time of filing the Mandamus Petition on March 29, 1988 (a new Code of Professional Responsibility went into effect on April 1, 1988). (See ethical discussion at page 352 *et seq.* of Document D beginning at General Appendix Page 104a.)

Again it is respectfully submitted that the Third Circuit Court of Appeals in this case has so far departed from the accepted and usual course of judicial proceeding that there is a pressing need for your Honorable Supreme Court to exercise its power of supervision over said Circuit Court by granting the Writ.

**Discussion of the Second Question Presented**

Assuming *arguendo* that the said Mandamus Petitioners in this case had legal "standing" to initiate this Mandamus action, should a Writ of Mandamus have been issued on the facts of this case?

It is submitted that contrary to the decision of the Third Circuit Court of Appeals, the proper answer to this second question presented is clearly "NO". The Third Circuit's legal position as to every facet of this issue is in conflict with almost every other Circuit and in fact, is in conflict with its own decisions rendered as recently as this year (1988).

Contrary to the statement on page 4 of the Third Circuit Panel Opinion in this case (See General Appendix page 7a, Document B), the Mandamus Petition in this case is clearly a surrogate for an appeal and accomplishes exactly the same end as would be the case if a successful appeal had been taken.

If an appeal of this District Court's "Conversion Order" had been successfully accomplished, this bankruptcy case would have remained in Chapter 11, exactly as before and the Mandamus Petitioners will remain as participants in the fraudulent conveyance litigation.

The Writ of Mandamus should not have issued in this case because Mandamus may not serve as a substitute for an appeal and Mandamus is an extraordinary remedy available only when the Petitioner proves that the District Court has manifestly abused its discretion or usurped judicial power. See *F/S Airlease, Inc. v. Simon, et al.*, 844 F.2d 99, 103, 104 (3rd Cir. 1988), where an appeal in the circumstances of the case at bar was available under Third Circuit law.

Since an appeal of this Court's "Conversion Order" was readily available to all interested parties in the case at bar, the remedy of Mandamus is unavailable in this case. See *Brown vs. U.S.A., et al.,* 851 F.2d 615, 620 (3rd Cir. 1988).

This District Judge admittedly did not abuse his discretion by converting this case to Chapter 7, and this Petition for Mandamus should be dismissed. In fact, the Honorable Circuit Panel in this case (found at page 18, of the slip opinion) when referring to said "conversion order", said ". . . the motion to convert is uncontested. . .". (See General Appendix page 21a, Document B at page 18.)

This District Judge clearly felt and expressed on the record in clear, unmistakable language that none of these matters (*i.e.* "Mellon Matter" and/or the "Lawyer Matter"), were of such sufficient substance to warrant an instant recusal on the facts of this case.

Mellon as an "Unsecured Trade Creditor" was represented at the January 29, 1988, hearing by David Humphrey and the lawyers who were involved in a case in which this Judge was a party, apparently were also present in the courtroom. (This District Judge was never advised as to the identity of said attorneys.) If any of these affected parties and/or attorneys were in doubt about this District Judge's impartiality, they had over forty-five days prior to the date of the "Conversion Order" of March 15, 1988 (See General Appendix page 22a, Document C), to move for this Judge's recusal pursuant to 28 U.S.C. Sec. 144 and/or 455. (See Statute Appendix II Exhibits 4 and 5, page 227a.) *NO* recusal motion was ever filed in this case and looking back as a matter of fact in hindsight, every party, directly affected by the "conversion order", (including the Petitioners in the Mandamus matter), agree that this District Judge was not guilty of abusing his discretion and no unsecured creditor of any class has suggested that this

District Judge acted in an impartial, arbitrary or capricious manner in entering the "conversion order" in this case. At most, even assuming *arguendo* that this District Judge should have recused himself, his failure to do so clearly is harmless error.

The action of the Third Circuit Court in issuing this Writ of Mandamus against this Certiorari Petitioning Judge, in a case where a recusal motion was never filed, where there was no abuse of judicial discretion and where at most there was harmless error, is in direct conflict with *United States v. Murphy,* 768 F.2d 1518, 1541, *cert. denied,* 475 U.S. 1012; 106 S. Ct. 1188, 89 L.Ed. 2d 304 (1986), (7th Cir. 1985), where it was held:

> "If an defendant wants a judge to stand aside under Sec. 455(a), *he must make the appropriate motion, judicial acts taken before the motion may not later be set aside unless the litigant shows actual impropriety or actual prejudice; appearance of impropriety is not enough to poison the prior acts.* See *Margoles v. Johns,* 660 F.2d 291 (7th Cir. 1981) cert denied, 455 U.S. 909, 192 S. Ct. 1256, 71 L.Ed 2d 447 (1982) (appearance of impropriety, and perhaps even actual impropriety, may not be raised for the first time on collateral attack); *Barry v. United States,* 528 F. 2d 1094, 1100 (7th Cir.) *cert. denied,* 429 U.S. 826, 97 S.Ct. 81, 50 L.Ed. 2d 88 (1976) (when the trial is "impeccably fair and just" an erroneous failure to recuse is harmless error)".

The bona fides of this Mandamus Petition is clearly brought into question since as aforestated, even Mandamus Petitioners Campbell and Cindrich freely admit that this District Judge did not abuse his discretion by converting the bankruptcy case to Chapter 7, and the Honorable Circuit Panel has found that ". . . no one is challenging the substance of the conversion order, and the motion to convert is uncontested . . .". (See General Appendix pages 4a and 21a, Document B at pages 1 and 18.)

The action of the Third Circuit Court of Appeals in directing this Certiorari Petitioning District Judge to vacate the "Conversion Order" where at most there was admittedly only harmless error, is in direct conflict with and contrary to the most recent pronouncement of your Honorable Supreme Court on the subject of disqualification of Judges pursuant to Title 28 U.S.C. Section 455(a), where it was said in the very recent 1988 case of *Liljeberg v. Health Services Corp.*, (486 US _____ at _____, 100 L.Ed. 2d 855, at 873, 108 S.Ct. 2194 at 2203, 1988):

> "A conclusion that a statutory violation occurred does not, however end our inquiry. As in other areas of the law, there is surely room for harmless error committed by busy Judges who inadvertently overlook a disqualifying circumstances. There need not be a draconian remedy for every violation of Section 455(a)."
>
> See also *Barry v. United States,* 528 F.2d 1094, 110 (7th Cir. 1976), where it was held that a Judge would not be disqualified under Section 455, where there was harmless error.

In light of this serious conflict as to the interpretation of Section 455(a) between the Third Circuit and your Honorable Supreme Court, as to the treatment of "harmless error", the Petition for a Writ of Certiorari in this case should be allowed.

**Discussion of the Third Question Presented**

Is it proper for the Court of Appeals to issue a Writ of Mandamus where it is both legally and physically impossible for the Respondent, United States District Judge, to carry out the directives set forth in the Writ?

It is submitted that contrary to the decision of the Third Circuit Court of Appeals, it is not legally proper to issue this Writ of Mandamus (See General Appendix Page 1a, Document A) against this Certiorari

Petitioning United States District Judge as Respondent, directing said Judge to vacate certain findings and orders entered in this case, where it is impossible for him to carry out the direction of the Writ.

It is physically and legally impossible for this Judge to carry out the directive of the Writ to vacate certain orders and findings in this case, because on March 30, 1988, almost six months *prior* to the issuance of the Writ of Mandamus on September 26, 1988, this District Judge recused himself from said bankruptcy case, which case was immediately reassigned to another District Judge. In this District Court (The Western District of Pennsylvania) where there is an individual calendar system, only one District Judge has jurisdiction of any one case at any one time.

Once a Judge has recused himself, he cannot affect the determination of any case from which he is barred. As was pointed out in *Arnold v. Eastern Airlines, Inc.*, 712 F.2d 899, 904 (4th Cir. 1983):

> "There is a ready explanation, Judge Ervin is regular and active, and as a general proposition is in service. However, should he, or any other regular, active member of the court, recuse or disqualify himself at any time, he is out of service insofar as that particular case is concerned. *To disqualify means to debar legally.* See Webster's New International Dictionary, 2d ed., p. 753. *That is synonymous with lack of legal capacity, i.e., with inability to serve.* Hence, Judge Ervin properly did not sit during the en banc rehearing, because, for the particular case, he was not one of the circuit judges in regular active service."

This action of the Third Circuit in directing this Judge to do that which is legally and physically impossible and subjecting him to a possible contempt citation, is clearly contrary to the law of the Fourth Circuit (the Arnold case cited *supra*) and this conflict between the two Circuits certainly should be reviewed and reconciled by your Honorable Supreme Court.

**Discussion of the Fourth Question Presented**

This District Court Judge has said before and will now say again that it is ethically improper for the Law Firm of Mansmann, Cindrich and Huber (Titus) to practice in the Bankruptcy Courts of the Third Circuit and/or for them to address bankruptcy matters in the District Courts in the Third Circuit and/or the Court of Appeals for the Third Circuit such as in the case at bar.

At the time the Law Firm of Mansmann, Cindrich and Huber (Titus) was illegally appointed on July 28, 1983, to act as attorney for the Committee of Unsecured Creditors on a 33% contingent fee basis to pursue the "fraudulent conveyance" litigation contrary to case law and without the advice, knowledge and/or consent of at least the great majority of the real parties in interest and without a noticed and scheduled "cost-benefit" hearing, as is required by law, Judge Carol L. Mansmann, (the wife of Jerome Mansmann, senior partner in the Firm of Mansmann, Cindrich and Huber (Titus)), was a United States District Judge in the Western District of Pennsylvania, having been appointed by President Reagan, effective March 19, 1982.

At the time of the Bankruptcy Court Order of July 28, 1983, Judge Mansmann was a member of the Board of United States District Judges who had the power to appoint United States Bankruptcy Judges to their position of authority in the Western District of Pennsylvania.

Although this Judge, Paul A. Simmons, presumes that all Judges act lawfully and properly, the legal system must avoid even the appearance of impropriety. In this instance, one might reasonably infer (and presume even though wrongfully) that the late Bankruptcy Judge Gibson was at least thinking about the relationship of Judge Mansmann, (who was then on the appointing authority for Bankruptcy Judges), with her husband's

law firm, when he, Judge Gibson, knowingly and improperly appointed said Firm of Mansmann, Cindrich and Huber (Titus) to represent the "Unsecured Creditors' Committee" in the "fraudulent conveyance" litigation on a 33% contingency basis with a potential legal fee of twelve million dollars.

On April 4, 1985, Judge Mansmann was appointed to the United States Court of Appeals for the Third Circuit where she now serves. In the meantime, on July 10, 1984, the bankruptcy law was amended to make the Judges of the United States Court of Appeals the appointing authority for Bankruptcy Judges. It does not take a genius to infer that a Judge in the Bankruptcy Court who wants to be reappointed to said Bankruptcy Court might (even unconsciously) tend to favor her husband's law firm in contested bankruptcy matters before said Judge in Bankruptcy Court. In any event, it is clear that there is an appearance of impropriety under the above recited circumstances for Attorney Jerome Mansmann's Firm to practice before Bankruptcy Judges who may feel beholden to his wife in order to obtain reappointment to said Bankruptcy Court.

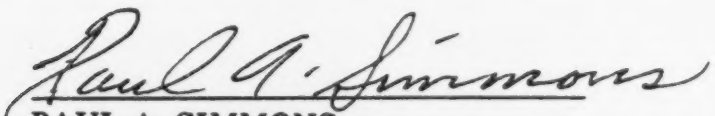
It was suggested to this Judge that some "authority" has written an opinion which permitted the Mansmann Firm to practice in the Bankruptcy Court, under these circumstances, but a copy of such opinion has never been produced.

In any event, the Judges of the Honorable Third Circuit Court of Appeals should also have considered disqualifying themselves in this case because of their colleague's, Judge Mansmann's, direct financial involvement in this case, suggested by her husband's law firm's admitted vested interest in a potential twelve million dollar legal fee; and in an event of a "remand", it is respectfully suggested that the Supreme Court of the United States should appoint three Circuit Judges from another Court of Appeals to consider this case in order to avoid the appearance of impropriety.

## Conclusion

WHEREFORE, for all of the reasons enumerated herein and for the reason that the United States Court of Appeals for the Third Circuit has rendered many decisions on many very important legal matters in this case that clearly and directly conflict with decisions of other Courts of Appeals on the same important legal matters and in some instances, the Third Circuit decision on legal questions in this case conflicts with decisions of your Honorable Supreme Court, and because the Third Circuit Court of Appeals has so far departed from the accepted and usual course of judicial proceedings so as to call for the exercise of your Honorable Supreme Court's power of supervision, this Petition for a Writ of Certiorari should be granted.

Respectfully submitted,



PAUL A. SIMMONS
*United States District Judge*

88-1174

No. _____

Supreme Court, U.S.
FILED
JAN 7 1989
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

# Supreme Court of the United States

October Term, 1988

THE HONORABLE PAUL A. SIMMONS, United States District Judge for the Western District of Pennsylvania,

*Pro Se Petitioner,*

vs.

JAMES MOODY, Trustee of the Estate of JEANNETTE CORPORATION, and THE COMMITTEE OF UNSECURED CREDITORS OF JEANNETTE CORPORATION,

and

ROBERT J. CINDRICH, Esquire, MANSMANN CINDRICH & TITUS, DOUGLAS A. CAMPBELL, Esquire, and CAMPBELL & LEVINE,

and

SECURITY PACIFIC BUSINESS CREDIT, INC., THE COCA COLA BOTTLING COMPANY OF NEW YORK, INC., KNY DEVELOPMENT CORPORATION, J. CORP., JOHN P. BROGAN, JOHN J. BROGAN, HANLEY DAWSON, Jr., HANLEY DAWSON, III, JAMES A. McLEAN, JAMES R. WINOKER, ROBERT M. JANOWIAK, INTERDYNE, INC., MUENCH-KREUZER CANDLE COMPANY, CALVIN McCRACKEN and FRANK W. STOREY,

and

JEANNETTE CORPORATION t/a JEANNETTE GLASS, JOHN POLOJAC and AMERICAN FLINT GLASS WORKERS UNION OF NORTH AMERICA, LOCAL NO. 535,

*Respondents.*

## APPENDIX TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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236 pp

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## APPENDIX I

## DOCUMENT A

**Writ of Mandamus of the United States Court of Appeals for the Third Circuit**

UNITED STATES COURT OF APPEALS
For the Third Circuit

---

No. 88-5249

---

JAMES MOODY, Trustee of the Estate of JEANNETTE CORPORATION, and THE COMMITTEE OF UNSECURED CREDITORS OF JEANNETTE CORPORATION,

and

ROBERT J. CINDRICH, Esquire, MANSMANN CINDRICH & TITUS, DOUGLAS A. CAMPBELL, Esquire and CAMPBELL & LEVINE,

*Petitioners,*

vs.

THE HONORABLE PAUL A. SIMMONS, United States District Judge for The Western District of Pennsylvania,

*Nominal Respondent,*

and

SECURITY PACIFIC BUSINESS CREDIT, INC., THE COCA COLA BOTTLING COMPANY OF NEW YORK, INC., KNY DEVELOPMENT CORPORATION, J. CORP., JOHN P. BROGAN, JOHN J. BROGAN, HANLEY DAWSON, Jr., HANLEY DAWSON, III, JAMES A. McLEAN,

JAMES R. WINOKER, ROBERT M. JANOWIAK, INTERDYNE, INC., MUENCH-KREUZER, CANDLE COMPANY, CANDLE COMPANY, CALVIN McCRACKEN and FRANK W. STOREY,

and

JEANNETTE CORPORATION t/a JEANNETTE GLASS, JOHN POLOJAC and AMERICAN FLINT GLASS WORKERS UNION OF NORTH AMERICA, LOCAL NO. 535,

*Respondents.*

---

(Related to W. D. Bankruptcy No. 82-3265).

---

Present: BECKER, HUTCHINSON and COWEN,
*Circuit Judges.*

*WRIT OF MANDAMUS*

UNITED STATES OF AMERICA }
THIRD JUDICIAL CIRCUIT } SS

To the Honorable Paul A. Simmons, United States District Judge for the Western District of Pennsylvania,

GREETINGS:

Whereas, the Honorable Paul A. Simmons declared his intention to recuse himself in the proceedings pending before him at D.C. Civil No. 83-2383 and Bankruptcy No. 82-3265 during a hearing on January 29, 1988; and,

Whereas, the said Honorable Paul A. Simmons entered various orders and findings in those causes after that date; and,

Whereas, a petition for writ of mandamus was filed by Robert J. Cindrich, Esquire, Mansmann Cindrich & Titus, Douglas A. Campbell, Esquire, and Campbell and Levine on March 30, 1988, requesting that this Court issue a writ of mandamus directing that all actions of the said Honorable Paul A. Simmons following the declaration of his intention to recuse himself be vacated; and, supplemental and amended petitions having been filed on April 7, 1988 and April 14, 1988; and,

Whereas, the nominal respondent, the Honorable Paul A. Simmons, filed answers to the petition on April 25, 1988, and May 16, 1988, and the respondents, Security Pacific Business Credit, Inc. and American Flint Glass Workers Union of North America, Local No. 535, filed answers on May 17, 1988; and

Whereas, the Court on this date has entered an Order directing the Clerk of this Court to issue a writ of mandamus in accordance with its opinion;

Now therefore, the Honorable Paul A. Simmons, is hereby *REQUIRED* and *DIRECTED*, immediately upon receipt of this WRIT, and without unreasonable delay, to vacate all orders and findings entered since January 29, 1988, in the proceedings pending before him at Civil Action No. 83-2383 and Bankruptcy No. 82-3265.

For the Court,

SALLY MRVOS
Clerk, United States Court
of Appeals for the Third Circuit

DATED: September 26, 1988

## DOCUMENT B

**Opinion of the United States Court of Appeals for the Third Circuit**

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

---

No. 88-5249

---

JAMES MOODY, Trustee of the Estate of JEANNETTE CORPORATION, and THE COMMITTEE OF UNSECURED CREDITORS OF JEANNETTE CORPORATION,

and

ROBERT J. CINDRICH, Esquire, MANSMANN CINDRICH & TITUS, DOUGLAS A. CAMPBELL, Esquire, and CAMPBELL & LEVINE,

*Petitioners*

v.

THE HONORABLE PAUL A. SIMMONS, United States District Judge for the Western District of Pennsylvania,

*Nominal Respondent*

and

SECURITY PACIFIC BUSINESS CREDIT, INC., THE COCA COLA BOTTLING COMPANY OF NEW YORK, INC., KNY DEVELOPMENT CORPORATION, J. CORP., JOHN P. BROGAN, JOHN J. BROGAN, HANLEY DAWSON, Jr., HANLEY DAWSON, III, JAMES A. McLEAN, JAMES R. WINOKER, ROBERT M. JANOWIAK, INTERDYNE, INC., MUENCH-KREUZER, CANDLE COMPANY, CANDLE COMPANY, CALVIN McCRACKEN and FRANK W. STOREY,

and

JEANNETTE CORPORATION t/a JEANNETTE GLASS, JOHN POLOJAC and AMERICAN FLINT GLASS WORKERS UNION OF NORTH AMERICA, LOCAL NO. 535,

*Respondents*

---

Petition for Writ of Mandamus and Prohibition
(Related to W.D. Bankruptcy
No. 82-3265)

---

Before: BECKER, HUTCHINSON and COWEN,
*Circuit Judges*

(Filed September 26, 1988)

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---

* NOTE: This within opinion has been very recently published after this Petition for a Writ of Certiorari was drafted and it is cited at 858 F.2d 137 (3rd Cir. 1988).

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---

**OPINION OF THE COURT**

---

BECKER, *Circuit Judge.*

This opinion addresses a mandamus petition filed in the terminal stages of a protracted bankruptcy case. The case was before the district court, the reference to the bankruptcy court having been withdrawn. The petition arises from discomfiting circumstances, for it requests that the assigned district judge be ordered to vacate various comments and fact findings that impugned the integrity of counsel for the Bankruptcy Trustee. The petition also requests that we vacate all of the actions of the district judge (including the statements) that followed his announcement that he intended to recuse himself from the case after he had entered an order converting the bankruptcy proceedings from Chapter 11 to Chapter 7. Neither the actual recusal, which was ultimately effected, nor the conversion order is the subject of an appeal, and it is not contended that the mandamus petition is a surrogate therefor.

Unfortunately, although no one is challenging the substance of the conversion order, we will be obliged to vacate it and also all other orders entered after the date

of the judge's recusal declaration, made at a hearing on January 29, 1988. Deferring to the judge's own repeated acknowledgements at the hearing that his impartiality could reasonably be questioned, we conclude that the judge should have recused at that time and that he was not empowered to perform judicial actions thereafter. We find no basis on this record for the judge's conclusion that his impartiality could be questioned only *after* he entered the conversion order, and with respect to proceedings to follow. Moreover, even though a recused judge can enter "housekeeping" orders until a successor judge is assigned, the orders entered here -- the conversion order, orders disqualifying counsel and setting aside a fee agreement -- and the challenged fact findings, were clearly not of a "housekeeping" variety. The petition for mandamus will therefore be granted.

## I. PROCEDURAL HISTORY

The bankruptcy case commenced on October 4, 1982, when an involuntary bankruptcy petition was filed against Jeannette Corporation in the Bankruptcy Court for the Western District of Pennsylvania, pursuant to Chapter 7 of the Bankruptcy Code. On December 10, 1982, on motion of the debtor, the bankruptcy proceeding was converted from Chapter 7 to Chapter 11. Four and a half years later, on February 2, 1987, John Polojac and the American Flint Glass Workers Union of North America, Local No. 535, creditors of the bankrupt debtor, moved to reconvert the proceeding from Chapter 11 to Chapter 7. On March 10, 1987, the District Court for the Western District of Pennsylvania entered an order withdrawing the reference from the Bankruptcy Court.

On December 17, 1987, counsel for the Bankruptcy Trustee wrote the district judge stating that the Trustee took no position on the reconversion

issue. Later, in an undated motion, the Trustee advocated extending the claims bar date in lieu of converting the proceeding from Chapter 11 to Chapter 7.

Although no formal recusal motion was ever filed, several days prior to January 29, 1988, the date on which the hearing on the Chapter 7 conversion motion was to be held, the district judge received another letter from counsel for the Trustee, this time suggesting that the judge might have a conflict of interest in the case because the judge's daughter worked for Mellon Bank, one of Jeannette Corporation's 882 unsecured trade creditors.

At the very outset of the January 29 hearing the judge brought this letter to the fore, reading significant portions of it into the record including the following:

> The Court may be unaware of the fact that Mellon Bank has a claim in Jeannette's bankruptcy case of $338,622.26, making it the second largest of the unsecured creditors. Prominent in the class of unsecured creditors, Mellon's interests will likely conflict with those of the Pension Benefit Guaranty Corporation and the former hourly employees.

He then commented extensively on the recusal issue, adverting at one point to "ethical considerations," and ultimately announced his intention to recuse himself from the case because of the potential Mellon Bank conflict. He repeated that this was his intention on some seven occasions during the course of the hearing.[1]

---

1. During his discourse, the judge stated, inter alia:

> systematically, as a matter of fact, the Clerk is put on notice any litigation involved with Mellon Bank. I don't take that litigation. I mean, it's never assigned to me.

Furthermore, during the hearing it was brought to the judge's attention that there might be a conflict arising from a personal injury action that the judge and his wife had recently filed in the Court of Common Pleas of Allegheny County, Pennsylvania. Two of the defendants in this (bankruptcy) case are represented by the same law firm that is representing a defendant in the personal injury action. Furthermore, another defendant in the personal injury suit is represented by a law firm in which the wife of an attorney for the trustee is employed.[2] Upon hearing this, the judge stated "I ought to get out of this case." [Petitioner's Exhibit E, at 148-49]

Notwithstanding his repeated declarations about the necessity for recusal,[3] the judge decided that he would recuse himself only *after* he had acted on the conversion petition. He explained

> what I am going to do today won't have anything to do with any matter which bears on Mellon Bank or any interest that they might have. And I assure all

---

> However, this was never brought to my attention until this letter came to me on the nineteenth of January.
>
> Petitioners' Exhibit E, at 13.

2. That attorney, who was involved in an acrimonious exchange with the judge, is one of the petitioners for mandamus relief.

3. For example, at one point the judge stated:

> I think I've got to recuse myself. Not because I want to, but because I think I'm constrained to do it under these circumstances. And I would rather have, I would rather have a fresh judge look at it.
>
> Petitioners' Exhibit E, at 204. The judge added:
>
> And I certainly think that it's a possibility that somebody could contend later on that I should have recused myself.
>
> Petitioners' Exhibit E, at 205.

> of you that if and when this case -- well, after I conclude what I am going to do today, and another judge gets it, and the case goes to trial, of course, I won't be sitting and there won't be anything -- anything I do today won't in any way impact on any interest that Mellon Bank might have in this litigation . . .
>
> I am going, as I indicated, after I finish these housekeeping matters, I think I should get out of the case. But at this point, after putting all the time and effort in it over all these years, and after, in my opinion, I bring to your attention a methodology and a way of solving the problems that have caused this case to come to a standstill, I think that I would be remiss in my duty if I had bowed out of the case and thrust this upon another judge who would have to spend hours, and hours, and hours in research and study in order to do what I believe should be done.

During the balance of the hearing the judge made a number of allegations seriously reflecting on the integrity of Robert A. Cindrich, Esq., and Douglas A. Campbell, Esq., who were representing the trustee. Inter alia, the judge accused counsel of "trying to rip off this estate in millions of dollars" [Petitioner's Exhibit E, at 122] and stated that they had "connived" to have Jeannette Corporation's bankruptcy case converted from a Chapter 7 to a Chapter 11 for their own personal benefit, *i.e.*, so they could "muscle in" on a large contingent fee.

Toward the end of the hearing, counsel for certain defendants requested that the judge reconsider his earlier decision to recuse himself. [Petitioner's Exhibit E, at 201-203]. However, noting that Mellon Bank's claim against Jeannette Corporation was "substantial" and that his daughter is a member of Mellon Bank's

credit review committee which reviews "these types of loans," the judge reiterated his position that recusal was necessary in order to avoid the appearance of impropriety. He added that he was doing so, because "[t]here have been a lot of acid type remarks made here, too." Thus, the January 29, 1988 hearing, which is said to have consumed six and one-half hours, concluded the same way it had begun -- with the judge stating his intention to recuse himself from the case.

On March 15, 1988, noting that an opinion would be filed with the clerk within fifteen days, the district court judge entered an order which provides, *inter alia*:

> 1. That the Bankruptcy Case shall be converted from a Chapter 11 to a Chapter 7;
>
> 2. That the Creditors' Committee shall be removed as a plaintiff in the District Court Action;
>
> 3. That the contingent fee order signed by Bankruptcy Judge Gibson shall be vacated *ab initio*;
>
> 4. That the law firms of Campbell & Levine and Mansmann Cindrich & Titus shall be removed as attorneys in the District Court Action (both because of the conversion to Chapter 7 and for reasons to be disclosed in an Opinion to be filed within 15 days);
>
> 5. That it is recommended "very reluctantly" that said law firms be retained to conduct the "fraudulent conveyance" litigation on an hourly fee basis, although no such fees shall be paid until said litigation has been concluded;
>
> 6. . That every attorney and law firm of record in the Bankruptcy Case and/or the District Court Action shall within 60 days file a "minute and fully

itemized accounting statement of all moneys received" from the Debtor's estate and/or "any client represented in all of these cases or related cases . . .:" and

7. That the Trustee shall likewise file such a statement for himself and for his accounting firm.

The March 15 Order was accompanied by 48 pages of "findings of fact," many of which, congruent with the judge's earlier remarks, are highly critical of Trustee's counsel.

The Judge distributed his (March 15) Findings of Fact, Conclusion of Law and Order during a proceeding in his courtroom on March 16, 1988, at which a number of newspaper reporters were present, apparently having been notified of the proceeding by the judge's secretary. The judge spoke on the record for more than an hour, explaining his order. Messrs. Cindrich or Campbell, supported by affidavits from persons present at the hearing, contend that the courtroom session turned out to be a press conference. The judge, through various affidavits, denies that he held a press conference.

On March 29, 1988, the judge filed an "Opinion in Support of and in Explanation of the Findings of Fact, Conclusions of Law and Order." In that opinion the district judge set forth "four separate and distinct reasons" why the bankruptcy proceeding should be converted from Chapter 11 to Chapter 7. The first three reasons were the traditional reasons for a conversion order: (1) the continuing diminution of the debtor's assets and the consequent improbability of the debtor's rehabilitation; (2) the lack of feasibility of the Trustee's reorganization plan; and (3) the inevitable delay which would result from allowing the proceeding to continue under Chapter 11. The fourth reason for the conversion was what the district judge termed the

"bad faith unethical" conduct of the Trustee and the attorneys for the Trustee. Over half of he sixty-page opinion is devoted to this reason. Excerpts from the judge's opinion were reprinted in the Pittsburgh newspapers.

On the same day, Mr. Cindrich and the law firm of Mansmann, Cindrich and Titus, and Mr. Campbell and the law firm of Campbell and Levine (collectively "petitioners") filed with this court a petition for writs of mandamus and prohibition. The petition requested that we order the district judge: (1) to vacate all orders entered after January 29, 1988 in the proceedings pending before the district judge in the bankruptcy case; (2) to vacate all findings impugning counsel entered during the proceedings; (3) to return the files in the case to the Clerk of the United States District Court for the Western District of Pennsylvania for reassignment to a different member of the court; and (4) to refrain from entering any further orders or findings in the case. On the next day, March 30, the district judge entered an order recusing himself from further proceedings in the bankruptcy case.

On April 14, 1988, petitioners filed a supplemental and modified petition for writ of mandamus, reiterating the first two requests for relief presented in the original petition. The petitioners deleted the third and fourth requests for relief, which had been rendered moot by the entry of the district judge's recusal order. On April 25, 1988, the district judge filed a 75-page answer to the petition accompanied by a two-volume appendix and two volumes of exhibits to the appendix. The judge, in opposition to the petition, reiterated much of what he had said in his March 29 opinion.

On May 9, 1988, we ordered all parties opposing the relief requested by petitioners to file an answer to the mandamus petition. On May 16, 1988, the district judge filed a second answer to the petition. On May 17,

1988, John Polojac and the American Flint Glass Workers Union, Local No. 535, also filed an answer supporting the district judge's conversion of the bankruptcy proceeding.

II.

The threshold question before us is whether the district judge's actions after his January 29 announcement of its intention to recuse must be set aside.[4] This question is governed by 28 U.S.C. § 455 which provides, in pertinent part:

> (a) Any justice, judge, or magistrate of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned.
>
> (b) He shall also disqualify himself in the following circumstances:
> ...(4) He knows that he, individually or as a fiduciary, or his spouse or minor child residing in his household, has a financial interest[5] in the

---

4. In a cover letter to 17 exhibits and other miscellaneous materials sent to Chief Justice Rehnquist, the district judge has suggested that the members of this panel (and the entire United States Court of Appeals for the Third Circuit) might wish to consider recusal from consideration of the instant petition in light of the fact that our colleague, Judge Carol Los Mansmann, is the spouse of one of the named partners in one of the petitioning law firms. We do not believe that our impartiality may reasonably be questioned for entertaining this petition under these circumstances, and we would decline to recuse ourselves from ruling on the petition for writ of mandamus even had the recusal issue been properly raised under Federal Rule of Appellate Procedure 27.

5. Financial interest is defined in § 455(d)(4) of the statute to mean "ownership of a legal or equitable interest, however small, or a relationship as director, adviser, or other active participant in the affairs of a party."

> subject matter in controversy or in a party to the proceeding, or any other interest that could be substantially affected by the outcome of the proceeding;
>
> (5) He or his spouse, or a person within the third degree of relationship to either of them, or the spouse of such a person:
> ...iii. Is known by the judge to have an interest that could be substantially affected by the outcome of the proceeding.

28 U.S.C. § 455 (1982).[6]

We ordinarily review recusal decisions for abuse of discretion. We first look to § 455(b), which provides that a judge is automatically recused upon the existence of certain familial and/or financial relationships,[7] and then to the more general terms of § 455(a).

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6. The other subsections of § 455 are not relevant. We note also that the American Bar Association Code of Judicial Conduct, consistent with § 455, prescribes that a judge "should disqualify himself in a proceeding in which his impartiality might reasonably be questioned, including but not limited to instances where...(c) he knows that he, individually or as a fiduciary, or his spouse or minor child residing in his household, has a financial interest." A.B.A. Code of Judicial Conduct, Canon 3C(1)(c) (1986) (emphasis added).

7. Section 455(b) has been construed to require recusal if a judge, the judge's spouse, or minor children residing with the judge possess a *financial* interest in the subject matter of or are parties to a controversy, no matter how small the interest and regardless of whether the outcome of the proceeding could have a substantial effect upon it. If the judge, the judge's spouse, or someone within the third degree of relationship to one or both of them possesses any *non-financial* interest in the case, recusal will be required only if that interest could be substantially affected by the outcome of the proceeding. In re New Mexico Natural Gas Antitrust Litigation, 620 F.2d 794, 796 (10th Cir. 1980).

It would appear that the automatic recusal provisions do not apply in this case. The district judge's daughter, a credit analyst for Mellon Bank, is not a minor child residing in the judge's household, and at all events, she does not have a financial interest as defined in the statute or an automatically disqualifying non-financial interest.[8]

Under § 455(a) a recusal is required when a reasonable person would harbor doubts about the judge's impartiality. *United States v. Sciarra*, 851 F.2d 621, 634 (3d Cir. 1988), *Edelstein v. Wilentz*, 812 F.2d 128, 131 (3d Cir. 1987). However, in terms of § 455(a), this case has an unconventional twist. Here, the judge himself repeatedly stated that he should recuse himself from the case, and eventually did so. Appellate courts will be most deferential to the finding of a trial judge that there is an appearance of impropriety in his continuing to sit on a case. In practical terms, even when, objectively, § 455(a) is not met, an appellate court will be extremely reluctant to second guess a judge whose heightened sensitivity to even a remote or speculative appearance of impropriety impells him or her to recuse.

That principle applies here. Although we express no opinion as to whether the law requires that the judge recuse himself, the judge here clearly found that the appearance of impartiality could be compromised

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8. *See also* Internal Operating Procedures for the Third Circuit Chapter 11.B.1.(d)(vi):

> Ownership of a small percentage of the outstanding shares of a publicly traded corporation that is listed as a creditor of the bankrupt who is a party to the lawsuit is not a "financial interest" in the subject matter in controversy or in a party to the proceeding unless the judge has an interest that can be substantially affected by the outcome of the proceeding.]

by reason of his daughter's employment at Mellon Bank and by his lawsuit in state court defended by counsel before him in the bankruptcy case. We will defer to that finding.

We next consider whether, given his concerns about impropriety, the judge acted properly in continuing to sit on the case for two more months and by issuing important orders. We think not. The judge announced that Mellon's interests will likely conflict with those of the Pension Benefit Guaranty Corporation and the former hourly employees. However, contrary to the judge's contention, there was a potential for that conflict to arise in the judge's consideration of the motion for conversion. Mellon Bank could possibly benefit from continuing efforts at chapter 11 reorganization, which could create more money for the unsecured creditors. On the other hand, because the employees and the PBGC have higher priority for their claims, *see* 11 U.S.C. § 507(a), they are less disadvantaged by the failure to reorganize. Since they also have an interest in getting their money quickly, they may benefit from a chapter 7 action. Thus, we respect the judge's opinion that he could not continue to sit on the case, but we disagree with him that the conflicts that he feared could only arise after the conversion motion was settled.

Similarly, the problems with his continuing involvement with the case, given the fact that some of the lawyers before him were also defending a suit to which he was a party, were equally valid before as well as after the entering of the conversion order. To the extent that the judge determined that they mandated recusal after the order, they must also mandate recusal before. Thus, if the judge should have recused (and we defer to his judgment that he should), he should have recused at the January 29 hearing.

Once a judge has disqualified himself, he or she may enter no further orders in the case. *Arnold v. Eastern Airlines, Inc.*, 712 F.2d 899 (4th Cir. 1983); *Stringer v. United States*, 223 F.2d 947 (9th Cir. 1956). His power is limited to performing ministerial duties necessary to transfer the case to another judge (including the entering of "housekeeping" orders). *In re Cement Antitrust Litigation*, 673 F.2d 1020, 1024-25 (9th Cir. 1982); *Application of Scott*, 379 F. Supp. 622, 624 (S.D.Tx. 1974). Thus, the only other relevant inquiry is whether the orders entered here can be characterized as "housekeeping." We conclude that orders converting a Chapter 11 bankruptcy proceeding to Chapter 7, disqualifying counsel or vacating a contingent fee agreement, and findings impugning counsel are too substantial to be considered mere "housekeeping."

Mandamus lies "to confine an inferior court to a lawful exercise of its prescribed jurisdiction or to compel it to exercise its authority when it is its duty to do so." *Roche v. Evaporated Milk Association*, 319 U.S. 21, 26 (1943). And "[i]n order to insure that the writ will issue only in extraordinary circumstances[,] . . . a party seeking issuance [must] have no other adequate means to attain the relief he desires." *Allied Chemical Corp. v. Daiflon, Inc.*, 449 U.S. 34, 35 (1980). Courts allow mandamus when a district court had made a clear error of law. *See Schlaghenhauf v. Holder*, 379 U.S. 104, 112 (1964); *Cipollone v. Liggett, Inc.*, 785 F.2d 1108, 1118 (3d Cir. 1986 (citing *Sporck v. Peil*, 759 F.2d 312, 314 (3d Cir. 1985)). This case satisfies these standards. A judge who was obliged to recuse acts outside his jurisdiction. At the very least, he commits a clear error of law. Moreover, where important facets of his rulings are not challenged on their own merit (as is the case here) or where those facets are not appealable (as is also the case here) there

is no alternative remedy. Mandamus is thus the proper remedy to vacate the orders of a judge who acted when he should have recused. *New York City Housing Development Corp. v. William T. Hart*, 796 F.2d 976, 979 (7th Cir. 1986).

Because the judge should have recused after finding that his impartiality could reasonably be questioned, we will grant the writ of mandamus to vacate all orders (including opinions) entered by the judge after January 29, 1988. More specifically, we will issue a writ of mandamus directing the respondent, Honorable Paul A. Simmons:

> to vacate all orders and findings entered since January 29, 1988 in the proceedings pending before the Respondent at Civil Action No. 83-2383 and in Bankruptcy No. 82-3265;[9]

In view of our issuance of the writ we need not address the interesting question whether mandamus will lie to vacate findings solely because they are clearly unsubstantiated.[10] In an excess of caution, however,

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9. The orders of principal significance are:

> 1. The conversion from Chapter 11 to Chapter 7.
> 2. A determination that the Committee of Unsecured Creditors has no standing to sue in the "fraudulent conveyance litigation" and that the Committee is therefore removed as a plaintiff in that case.
> 3. That the 33% contingent fee order entered by the Bankruptcy Court on July 28, 1983 should be vacated *ab initio*.
> 4. Recommendation that the lawyers for the unsecured creditors in the fraudulent conveyance litigation should continue to serve as lawyers after the conversion to Chapter 7, with provisions regarding the lawyers' compensation.
> 5. Various accounting orders.

10. Petitioners also submit that the orders disqualifying counsel and setting aside the contingent fee agreement which had

we have examined the record and note that we can find no justification for the district judge's disparaging statements about the petitioners, which he repeats in his papers presented to this Court.

It is with discomfiture that we enter this order as it sets the case back several months. However, the motion to convert is uncontested and we presume the new judge assigned to the case will be able to act with speed. The writ shall issue forthwith.[11]

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been approved by the bankruptcy court must be vacated because there has never been a hearing with respect to those orders, which were entered *sua sponte*, and because they are wholly unsupported by any record. They argue that orders entered without a hearing are wholly offensive to basic notions of due process and the appropriate remedy to vacate such an order is mandamus, citing Swindell-Dressler Corp. v. Dumbauld, 308 F.2d 267, 273 (3d Cir. 1962). In view of our disposition we need not reach this question. Neither must we resolve the dispute as to whether what the judge conducted in his courtroom on March 16 was a press conference. However, we observe that, if the petitioners' version of the March 16 proceeding is accurate, the proceedings were highly inappropriate.

11. In light of the animosity that appears to have arisen between the district judge and the two petitioning law firms, the district judge may wish to consider not sitting on cases involving these firms in the future.

A True Copy:

Teste:

*Clerk of the United States Court of Appeals*
*for the Third Circuit*

## DOCUMENT C

**Order of the United States District Court for the Western District of Pennsylvania, Dated March 15, 1988**

IN THE
UNITED STATES DISTRICT COURT
For the Western District of Pennsylvania

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Civil Action Nos. 83-2383, 86-2239, 86-2697, 87-0268, 87-0269, 87-1753, 87-2384, 87-2385, 87-2386.

Bankruptcy No. 82-3265.

Motion No. 87-531M.

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JAMES MOODY, Trustee of the Estate of JEANNETTE CORPORATION, *et al.*,

*Plaintiffs,*

vs.

SECURITY PACIFIC BUSINESS CREDIT, INC., *et al.*,

*Defendants.*

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JOHN POLOJAC and AMERICAN FLINT GLASS WORKERS UNION OF NORTH AMERICA, LOCAL NO. 535,

*Movants,*

vs.

JEANNETTE CORPORATION, t/a JEANNETTE GLASS,

*Debtor-Respondent.*

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*ORDER*

AND NOW, this 15th day of MARCH, 1988, for the reasons set forth in the hereinafter filed Opinion of this Court, and after oral hearing, argument of counsel and briefs of counsel and after taking judicial notice of the record and the undisputed facts set forth in the Docket Entries and supporting pleadings, transcripts and orders both in this United States Court and in the United States Bankruptcy Court (See particularly the Two Volume Appendix attached hereto and made a part hereof by reference) IT IS THE ORDER OF THIS COURT, that the above-captioned bankruptcy matter shall be and is immediately converted from Chapter Eleven of the United States Bankruptcy Code, as amended, to Chapter Seven of the same.

Because the Committee of Unsecured Creditors has no standing to sue in the above-captioned "fraudulent conveyance litigation" filed in this District Court as Civil Action No. 83-2383, and for the reasons to be set forth in the Opinion of this Court to be hereinafter filed at said Civil Action No. 83-2383, in support of this within Order, the Committee of Unsecured Creditors is removed as a Plaintiff in the above-captioned "fraudulent conveyance litigation"; further, the caption of said case (Civil Action No. 83-2383) shall be amended accordingly; further, the so-called 33% contingent fee order entered by the Bankruptcy Court, at Bankruptcy No. 82-3265, on July 28, 1983, is vacated ab initio and said "contingent fee agreement" shall not be given any legal force or effect whatsoever.

FURTHER, the Law Firm of Campbell and Levine and the Law Firm of Mansmann, Cindrich, Huber and Titus are removed as attorneys in this case as a matter of law because of the conversion to Chapter 7 and for reasons set forth in the hereinafter filed Opinion of this Court.

Because of the complexity of the above-captioned "fraudulent conveyance" litigation and because former counsel is very familiar with the same after almost five years of litigation, this District Court very reluctantly recommends that the Law Firms of Mansmann, Cindrich and Titus and Campbell and Levine be retained to conduct the "fraudulent conveyance" litigation. Further, this Court recommends that James Moody be retained as Trustee. However, these law firms and the Trustee shall be paid a reasonable fee on a hourly basis for necessary services rendered and they shall be strictly accountable for all money claimed or received for services rendered. Further, if attorneys' fees and/or expenses and costs are awarded in the RICO action in this case and/or for any other litigation claims, said lawyers shall reimburse Bankrupt Debtor for any moneys received so as to prevent said attorneys from receiving a double payment for expenses and/or services rendered. The Law Firms of Campbell and Levine and Mansmann, Cindrich and Titus shall not receive any legal fees for representing the Trustee in the above litigation until said litigation has been concluded. All fees heretofore billed to the Trustee Moody by Campbell and Levine for services rendered the Trustee Moody in regard to the "fraudulent conveyance" litigation shall be disgorged immediately and shall be returned by Campbell and Levine to the Debtor's estate.

FURTHER, every attorney and/or law firm of record in the United States Bankruptcy Case No. 82-3265, and in any of the above-captioned United States District Court cases shall file a minute and fully itemized accounting statement of all moneys received and/or claimed from the Bankrupt Debtor's estate, and/or of all money received from any client represented in all of these cases or related cases whether for services rendered and/or for money received for and/or in reimbursement

for expenses or for services furnished by others for said Debtor but paid to said attorney by parties other than the Debtor.

FURTHER, the Trustee, James Moody, shall likewise file a minute and fully itemized statement for himself as Trustee and for his accounting firm of all moneys received and/or claimed from the Bankrupt Debtor's estate, whether for services rendered and/or for money received for and/or in reimbursement for expenses or for services furnished by others but paid for by the Trustee and/or his accounting firm.

These accounts as above-mentioned for legal services, accounting services and reimbursement for expenses incurred, shall be filed within sixty (60) days of the date of this Order.

An Opinion of this District Court in support of these Findings of Fact, Conclusions of Law and the within Order shall be filed with the Clerk of this Court within fifteen (15) days of the date of this Order.

PAUL A. SIMMONS
*United States District Judge*

[319] **DOCUMENT D**

**Opinion of the District Court Issued in Support of the "Conversion Order". *Moody v. Security Pacific Business Credit, Inc.*, 85 B.R. 319 (W.D. Pa. 1988)**

JAMES MOODY, Trustee of the Estate of
Jeannette Corporation, *et al.*, Plaintiffs,

v.

SECURITY PACIFIC BUSINESS
CREDIT, INC., *et al.*,
*Defendants*,

v.

Calvin McCRACKEN, *et al.*,
Additional Defendants.

*In re* JEANNETTE CORPORATION,
t/a Jeannette Glass, Debtor.

John POLOJAC and American Flint
Glass Workers Union of North America,
Local No. 535, Movants,

v.

JEANNETTE CORPORATION, t/a
Jeannette Glass, Respondent.

Civ. A. Nos. 83-2383, 86-2239, 86-2697, 87-0268, 87-0269, 87-1753, 87-2384, 87-2385, and 87-2386.*
Bankruptcy No. 82-3265.
Motion No. 87-531M.

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* NOTE: Civil Action No. 83-2383, is the principal case and is referred to herein as "the fraudulent conveyance litigation" which is directly related to the Bankruptcy case numbered 82-3265. The other eight above-numbered civil actions are related to the principal case.

United States District Court,
W.D. Pennsylvania,
Civil Division.

March 15, 1988.
Opinion March 29, 1988.

Creditors moved to convert Chapter 11 proceeding to
[320] Chapter 7. The District [320] Court, Simmons, J., held that case would be converted where there had been unreasonable delay and there was no reasonable likelihood of rehabilitation.

Motion granted.

*1. Bankruptcy—3592*

Chapter 11 proceeding would be converted to Chapter 7 where there had been continuing and severe loss and diminution of debtor's assets since proceeding was originally converted from Chapter 7 to Chapter 11, and, following liquidation of debtor's business assets, there was no reasonable likelihood that debtor would be rehabilitated into going concern. Bankr. Code, 11 U.S.C.A. §1112(b).

*2. Bankruptcy—3592*

Moving party establishes diminution of estate, for purpose of converting Chapter 11 proceeding to Chapter 7, if substantial loss of assets can be shown from bankruptcy filing date until hearing on motion to convert. Bankr.Code, 11 U.S.C.A. §1112(b)(1).

*3. Bankruptcy—3592*

Potential recovery from lawsuit was insufficient to create reasonable likelihood of Chapter 11 debtor's rehabilitation, for purpose of avoiding conversion to

Chapter 7, where debtor no longer had other ongoing business to reorganize. Bankr.Code, 11 U.S.C.A. §1112(b).

*4. Bankruptcy—3591(1)*

Bankruptcy proceeding would be converted from Chapter 11 to Chapter 7 where proposed reorganization plan was unfeasible and could never be effectuated under any foreseeable circumstances; debtor was mere corporate shell, trustee was unable to identify unsecured creditors who were eligible to vote on plan, and trustee was unable to assign dollar value to great majority of claims in order to weigh and/or apportion dollar value of each claimant. Bankr.Code, 11 U.S.C.A. §1112(b)(2).

*5. Bankruptcy—3591(1)*

Chapter 11 proceeding would be converted to Chapter 7 where there had been inordinate delay in bringing bankruptcy proceeding under Chapter 11 to an end, and debtors' assets would have to be liquidated in any event; no confirmable plan of reorganization had been submitted after almost five years from Chapter 11 filing. Bankr.Code, 11 U.S.C.A. §1112(b)(3).

*6. Bankruptcy—3502.10*

Chapter 11 proceeding was being maintained for bad faith unethical reasons, and would be converted to Chapter 7 for just cause, where it was apparent that trustee and attorneys for trustee had maintained Chapter 11 proceeding for personal financial gain and without present intention to reorganize debtor. Bankr.Code, 11 U.S.C.A. §1112(b).

*7. Bankruptcy—2702*

Unsecured creditors' committee lacked standing to initiate fraudulent conveyance litigation against corporate debtor's principals once trustee brought such suit.

*8. Champerty and Maintenance—5(1)*

Lawyer should be very cautious and slow before obtaining financial interest in his client's litigation, especially where client-debtor has sufficient funds on hand to afford attorney on hourly basis.

*9. Bankruptcy—3030*

Counsel for unsecured creditors acted improperly in obtaining ex parte order employing him on contingent fee basis to pursue fraudulent conveyance action against debtor's principals, without cost-benefit hearing after notice to interested parties.

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George E. McGrann, Dickie, McCamey & Chilcote, Pittsburgh, Pa., for Coca-Cola Bottling Co. of N.Y. and New York Development.

[321] [321] Grace S. Harris, Pittsburgh, Pa., for Calvin McCracken.

Philip Beard, Stonecipher, Cunningham, Beard & Schmitt, Pittsburgh, Pa., for Unsecured Active and Retired Employees.

Robert J. Cindrich, Mansmann, Cindrich & Titus, Pittsburgh, Pa., for Unsecured Creditors Committee.

Christopher J. Keith, Bell, Boyd & Lloyd, Chicago, Ill., Robert O. Lampl, Pittsburgh, Pa., for Robert M. Janowaik and Interdyne Inc.

H. Woodruff Turner, Kirkpatrick & Lockhart, Pittsburgh, Pa., for debtor's Board of Directors (Brogan Group) (Jeannette Corp.).

Robert L. Potter, Strassburger McKenna Gutnick & Potter, Pittsburgh, Pa., for Frank Storey.

David J. Humphreys, Humphreys & Nubani, Pittsburgh, Pa., for Unsecured Trade Creditors.

Angie Arnett, Pension Benefit Guar. Corp., Washington, D.C.

Douglas Campbell, Stanley Levine, Campbell & Levine, Pittsburgh, Pa. for trustee, James Moody.

Sanford M. Lampl, Lampl, Sable, Makoroff and Libenson, Pittsburgh, Pa., Michael Pappone, Thomas Fuchs, Goldstein & Manello, Boston, Mass., for debtor, Jeannette Corporation.

George L. Cass, Buchanan & Ingersoll, P.C., Pittsburgh, Pa., William F. Lloyd, Michael J. Sweeney, Sidley & Austin, Chicago, Ill., for Security Pacific Business Credit, Inc.

# FINDINGS OF FACT, CONCLUSIONS OF LAW, OPINION AND ORDER

SIMMONS, District Judge.

## INTRODUCTION

The issue addressed in the within findings of fact, conclusions of law, opinion and order is whether this United States District Court should grant the motion requesting that the underlying Bankruptcy Code Chapter 11, Reorganization Proceeding filed in the United States Bankruptcy Court for the Western District of Pennsylvania, at Bankruptcy No. 82-3265, should be converted into a Bankruptcy Code Chapter 7, Liquidation Proceeding under the facts and law applicable to this case.

The procedural history of this above-captioned case, the companion bankruptcy case and the related cases in this Court is indeed both complicated and voluminous involving many thousand of pages and millions of dollars. In total, there are more than two thousand docket entries involved in this matter all of which have been litigated in the District Court and the Bankruptcy Court for over a period of five years.

A recitation of the relevant factual history in this case will demonstrate that the lawyers for the various litigants have worked themselves wittingly and/or unwittingly into a procedural box.

Without the affirmative intervention of this Court, it is believed that this case will never be tried with finality. In fact, on the present state of this record it is the belief of this Court that it is absolutely impossible to successfully try this case at this time.

## FINDINGS OF FACT

All of the documents and papers relating to the above-captioned cases, including all pleadings, hearing transcripts, docket entries and court opinions, court memorandum of law, and court orders filed both at the Bankruptcy No. 82-3265, in the United States Bankruptcy Court for the Western District of Pennsylvania and in the United States District Court for the Western District of Pennsylvania, at the above-captioned Civil Action numbers, 83-2383, 86-2239, 86-2697, 87-0268, 87-0269, 87-1753, 87-2384, 87-2385 and 87-2386, and particularly volumes one and two of the
[322] Appendix [322] submitted herewith and prepared by this Court for use in this within proceeding are incorporated into and are made a part of these *Findings of Fact* in this matter by this reference thereto.

This case was originally docketed as Bankruptcy Case No. 82-3265, and has unfolded over the last five years as follows:

On October 4, 1982, an involuntary petition in bankruptcy was filed against Jeannette Corporation trading as Jeannette Glass. (See Bankruptcy Docket Entry No. 1, Appendix Document No. 34), wherein Douglas Campbell claimed to be the attorney for the petitioning creditors even though he purported to represent the only and sole petitioning creditor, George Hill Co. with approximately a $9,000.00 claim. (Three creditors are required to petition for involuntary bankruptcy provided that the debtor has more than twelve creditors with non-contingent claims.)

In due course, Attorney George Cheever, of Kirkpatrick and Lockhart, appeared for the debtor, Jeannette Corporation, (See Bankruptcy Docket No. 6, Appendix Document No. 34) and on October 7, 1982,

Attorneys Hine and Flory, also appeared for the debtor and filed an answer and counterclaim to the "Involuntary Petition". (See Bankruptcy Docket Entry No. 7, Appendix Document No. 34)

On December 10, 1982, the debtor's attorneys moved the Bankruptcy Court to convert the Bankruptcy case from Chapter 7 to Chapter 11, of the Bankruptcy Code. (See Bankruptcy Docket Entry No. 33, Appendix Document No. 34)

After a hearing on the same day the motion to convert was filed, the Bankruptcy Judge ordered that the action was "hereby converted to Chapter 11" on December 10, 1982. (See Bankruptcy Docket Entry No. 23, Appendix Document No. 34) On the same day, December 10, 1982, an order was entered approving the appointment of nine unsecured creditors as a Committee of Unsecured Creditors (See Bankruptcy Docket Entry No. 24, Appendix Document No. 34) and Douglas A. Campbell and Campbell and Levine were approved as the attorneys for the Committee of Unsecured Creditors, it being represented that Campbell and Levine would hold no interest adverse to the Committee because Campbell and Levine would resign as attorneys for the petitioning creditors. (See Bankruptcy Docket Entry No. 25, Appendix Document No. 34)

On the same day, December 10, 1982, when the debtor, Jeannette Corporation petitioned the Bankruptcy Court to convert the proceeding from Chapter 7 to Chapter 11, it was upon the representation of the petitioner-debtor that the debtor was able to file a plan of reorganization. (See Bankruptcy Docket Entry No. 33, Appendix Document No. 34) Also, on the same day, December 10, 1982, the debtor purportedly listed the ten largest unsecured creditors. (See Bankruptcy Docket Entry No. 34, Appendix Document No. 34)

On December 15, 1982, the Bankruptcy Judge, for the second time reappointed the same business trade creditors to the Committee of Unsecured Creditors. (See Bankruptcy Docket Entry No. 40, Appendix Document No. 34)

On December 14, 1982, the debtor in possession, Jeannette Corporation, was authorized to employ Thompson, Hine and Flory, and Lampl, Sable & Makoroff as its counsel in the Chapter 11 case. (See Bankruptcy Docket Entry No. 41, Appendix Document No. 34)

On February 9, 1983, the Committee of Unsecured Creditors applied for standing to sue on behalf of the debtor in possession, Jeannette Corporation to recover certain alleged "fraudulent transfers". (See Bankruptcy Docket Entry No. 62, Appendix Document No. 34) These allegations of fraudulent activity formed the basis of the above-captioned Civil Action No. 83-2383, (hereinafter referred to as "fraudulent conveyance litigation") which was filed September 22, 1983, in this District Court and which is now one of the main concerns of this within Opinion. (See the complaint filed in this above-captioned
23] case at Civil [323] Action No. 83-2383, Appendix Document No. 35, in the United States District Court for the Western District of Pennsylvania)

On February 15, 1983, the debtor, Jeannette Corporation filed its first Plan of Reorganization under Chapter 11 of the Bankruptcy Code. (See Bankruptcy Docket Entry No. 69, Appendix Document No. 34) The plan was to be implemented by the debtor selling its glassware manufacturing division to a Pennsylvania Corporation known as Jeannette Industries, Inc., a Pennsylvania Corporation, including all of its land, buildings, and all personal property of every kind located in Westmoreland County, Pennsylvania.

Prior to this time, namely, December 27, 1982, the Bankruptcy Court approved what is referred to as "THE OLD AGREEMENT", dated December 6, 1982, wherein all of the assets owned by the debtor Jeannette Corporation, in its glassware manufacturing division located in Jeannette, Pennsylvania, were to be sold for $4,000,000. in cash, and two notes, one for $2,500,000., and a second note for $4,049,000.

This District Court cannot find the docket entry in the Bankruptcy case record reflecting this alleged Bankruptcy Court approval of "THE OLD AGREEMENT", however, on page 11, of the Disclosure Statement for the first submitted Reorganization Plan, the "OLD AGREEMENT" is referenced. (See Bankruptcy Docket Entry No. 70, Appendix Document No. 34)

In essence, the first Plan of Reorganization was to sell the entire glassware manufacturing business of the debtor as a going concern rather than involving the debtor in a piece-meal liquidation process, wherein the various assets of the company would be disposed of separately. The potential money damage recovery to the debtor, Jeannette Corporation, from the "fraudulent conveyance" litigation which was ultimately filed against the defendants in this above-captioned civil case at Civil Action No. 83-2383, was completely discounted in the first proposed Plan of Reorganization. (See Bankruptcy Docket Entry No. 69, Appendix Document No. 34)

On March 9, 1983, the original Plan of Reorganization was amended (the Second Plan) to require the proposed purchaser of debtor's assets to pay only one million in cash and debtor was to retain the three million dollars in accounts receivable and debtor rather than the purchaser was to collect the receivables. (See Bankruptcy Docket Entry No. 76, Appendix Document No. 34)

On March 10, 1983, the Committee of Unsecured Creditors objected to the First Amended Plan of Reorganization contending that information concerning present collectable accounts receivables was suppressed; that $2,650.000.00, in assets were omitted; that the Plan's discussion of the potential "fraudulent conveyance" litigation to void a fraudulent transfer of $11,710,800.00, that allegedly occurred during a "leveraged buyout transaction" involving the debtor, was incomplete and misleading. (See Bankruptcy Docket Entry No. 77)

On February 16, 1983, at a hearing, the Bankruptcy Court addressed the February 9, 1983, "Application" of the Committee of Unsecured Creditors to obtain "standing" to sue the defendants in this above-captioned matter for the alleged "fraudulent conveyance" and said Bankruptcy Court refused to consider the "Application" on the basis that granting of the same would "sidetrack" the debtor's endeavor to obtain a confirmed Plan of Reorganization. (See page 6, paragraph E 23, of the Bankruptcy Docket Entry No. 84, Appendix Document No. 34)

The committee of Unsecured Creditors by its attorneys, Campbell and Levine, remained undaunted, and on March 17, 1983, said Committee filed a revised application for standing to sue for the alleged above-referred to "fraudulent conveyance" transaction, and in addition, requested permission to engage as Co-counsel, Mansmann, Cindrich & Huber, on a 33% contingent basis. (See page 3 of Bankruptcy Docket Entry No. 83, Appendix Document No. 34)

Additionally, on the same day, March 17, 1983, the Committee of Unsecured Creditors filed a contemporaneous motion setting forth the underlying

24] reasons for the [324] Committee to have standing to prosecute the alleged fraudulent transaction, and at paragraph 21, *et seq.*, (See Bankruptcy Docket Entry No. 84, Appendix Document No. 1) the Unsecured Creditors's Committee states:

> "21. The Debtor's Plan of Reorganization is not proposed in good faith. Just as was the case with the Fraudulent Transaction, the Plan of Reorganization is designed for the primary economic benefit and convenience of the Debtor's principals, seeking release of all claims arising out of the Fraudulent Transaction and no consideration.
>
> 29. In addition, the Committee believes that the Plan of Reorganization now pending will not be confirmed, based upon the following:
>
> a. Mellon Bank, the sole Class 5 creditor under the Plan, has indicated it will reject the Plan;
>
> b. Pension Guaranty Benefit Corporation, the sole Class 3 creditor under the Plan has indicated it will reject the Plan.
>
> 30. The Committee believes that the Estate of the Debtor-in-Possession has valid causes of action against the parties involved in and/or responsible for the Fraudulent Transaction and matters related thereto which, if properly pursued, will result in a substantial dividend to the creditors of the Estate.
>
> 31. Debtor-in-Possession is controlled by individuals or entities whose interest in the outcome of the litigation involving the Fraudulent Transaction is in conflict with the interests of the Estate and its creditors. Furthermore, the Debtor-in-Possession has stated its belief that the Estate's causes of action arising out of the Fraudulent Transaction are without value.

32. Throughout the course of the Fraudulent Transaction, present counsel to the Debtor-in-Possession acted as counsel to J. Corp. and John P. Brogan, both of whom would be named as Defendants in the proposed litigation.

33. Counsel to the Debtor-in-Possession was retained by individuals or entities whose interest in the outcome of the proposed litigation is adverse to that of the creditors and the Estate.

34. The Committee has implied authority to bring the proposed litigation and, under the circumstances, appropriate creditor protection requires that the Committee be authorized to file and pursue the same."

The Debtor-in-Possession on March 23, 1983, responded with its Third Proposed Plan of Reorganization (Although it is styled "Second Amended Plan of Reorganization") arguing that a sale of a "going" business that has "going concern value" will net more money to the creditors than a forced liquidation. Further, the Debtor suggested that as to the proposed litigation (which ultimately was the subject matter of this case now before this Court) was of little value, saying on page 26 (See Bankruptcy Docket Entry No. 94, Appendix Document No. 34) of the Second Amended Disclosure Statement in regard to said Plan, the following:

> "Given the speculative nature of the claims being asserted by counsel for the Creditors Committee, the uncertainty of recovery, as well as the tremendous amount of time and expense involved in such litigation, it is Debtor's opinion that the interests of all unsecured creditors would best be served, by accepting the proposed Plan, which provides a certainty of payment as against the uncertainty and speculation of recovery from litigation".

The Committee of Unsecured Creditors objected to the Debtor's Third Proposed Plan of Reorganization (which is styled as the "Second Amended Plan of Reorganization" by filing on April 6, 1983) (See Bankruptcy Docket Entry No. 98, Appendix Document No. 34), a motion to withdraw the References from the Bankruptcy Court to the District Court. The relevant portions of said motion read as follows:

"A. *Procedural History of Case*

1. This case was commenced on October 4, 1982, by [325] the filing of an involuntary [325] bankruptcy Petition under Chapter 7 against Jeannette Corporation (the "Debtor") by George Hill Company.

2. The Debtor filed an Answer and Counterclaim opposing the involuntary Petition, and a hearing on the issues was scheduled for December 10, 1982.

3. On December 10, 1982 the Debtor moved to convert the case to a voluntary one under Chapter 11, and an Order for Relief under Chapter 11 was entered that day, allowing the Debtor status as Debtor-in-Possession.

4. On December 10, 1982, the Court entered an Order appointing this Committee and authorizing the engagement of Campbell & Levine, 220 Grant St., Pittsburgh, Pa. as its legal counsel.

5. On December 10, 1983 the Committee filed and presented an Application for Appointment of an Examiner. The Court declined to entertain the Application at that time and has not since scheduled a hearing on the same.

6. On December 13, 1982 the Debtor filed a Complaint at Adversary Proceeding No. 82-2669 to sell all the assets of its Jeannette Glass Division in

Jeannette, Westmoreland County, Pennsylvania to Jeannette Industries ("Complaint to Sell").

7. On December 27, 1982 an expedited hearing on Complaint to Sell was conducted by the Court and an Order confirming the sale was entered by the Bankruptcy Judge. Thereafter a Petition Requesting Review of an Order of United States Bankruptcy Judge Gerald K. Gibson and Entry of Order was presented to the District Court by the Debtor, and the Committee believes such Petition was granted and that such Order was entered. Thus, the sale was also confirmed by an Order of the District Court.

8. At the time of the hearing on the Complaint to Sell, counsel for the Debtor made the following material representations to the Court and to the Committee. (Transcript included as Exhibit "A"):

a. Equally important to the proceeds to be derived from the sale, is the fact that "the sale is going to mean jobs for people in the City of Jeannette and Westmoreland County, Pennsylvania. And that, of course, is the very important consideration." (Transcript, p. 7);

b. That the Debtor does have authority under 11 U.S.C. §363(b), to consummate the sale prior to the formulation and confirmation of a Plan of Reorganization. (Transcript, p. 10);

c. The closing would occur by January 15, 1983. (Transcript, p. 11);

d. Because of the size of the sale, and in light of the state of the applicable law, it was appropriate to have an Order from the District Court confirming what the Bankruptcy Court had done. (Transcript, p. 13)

9. The confirmed sale to Jeannette Industries has failed to close. Accordingly, after having received $2,300,000.00, offer from Jeannette Glass Company, the Committee on February 9, 1982 filed an Application for Revocation of Confirmation of Sale and for Hearing on New Offer. This Application was presented to the Court on February 16, 1983, but was opposed by the Debtor, and was not granted.

10. On February 15, 1983 Debtor filed a Plan of Reorganization and its first Disclosure Statement.

11. At hearings held on February 16, 1983, the Committee presented an Application for Standing to Sue on Behalf of the Estate of the Debtor-in-Possession ("Application for Standing"). The facts which give rise to the litigation proposed by the Committee in the Application for Standing arise out of an $11,710,800.00 fraudulent transfer and illegal corporate dividend on July 31, 1981, involving, as defendants, the Debtor's Directors, its corporate parent, Security Pacific Business Credit, Inc., and Coca-Cola Bottling Company of New York. These facts are more specifically detailed in Section B of this Application and in the Application for Standing. (See Exhibit "C")

12. The Court refused to consider the Application for Standing, indicating that the Court was not going to "sidetrack" the Debtor's endeavors to obtain a
[326] confirmed Plan of Reorganization by "numerous [326] other matters that can be handled at a later date." (Transcript, p. 12) A copy of the Transcript of the February 16, 1983 hearing is included as Exhibit "B".

13. On March 23, 1983 the Committee attempted to present a Revised Application for Standing to Sue with Regard to Litigation and Issues Arising out of a Specific Transaction ("Revised Application"), which sought

substantially the same relief as was sought in the Application for Standing. Again the Court indicated it would not entertain such an Application, as the same was inconsistent with the Debtor's efforts to obtain a confirmed Plan of Reorganization.

14. The Debtor has filed no less than three (3) Disclosure Statements with the Court, none of which has been approved, and all of which fail to disclose material substantial assets to the estate, and all of which have failed to provide creditors with adequate information regarding the affairs, assets and liabilities of the Debtor.

15. In summary, the bankruptcy judge has determined that the Debtor's exclusive right to file a Plan of Reorganization should effectively preclude all other parties in interest from the exercise of their independent right to take the actions necessary to investigate the affairs of the Debtor and to prevent its valuable assets from being wasted by insiders who, as will be demonstrated, have personal interests that are materially adverse to that of the estate and its bona fide creditors.

B. *Principal Asset of the Estate*

16. The principal asset of the estate of the Debtor is a claim of at least $11,710,800.00 against inter alia, Security Pacific Business Credit, Inc., J. Corp., the Debtor's Directors, and Coca-Cola Bottling Company of New York arising out of a fraudulent $11,710,800.00 transaction which occurred on July 31, 1981. (the "Fraudulent Transaction") (Note: A law suit for this "claim" was filed in this above-captioned now being addressed in this within Opinion at C.A. No. 83-2383)

On the same day, April 6, 1983, Bankruptcy Judge Cosetti declined to act on the above-referred to "motion" to withdraw the reference from the Bankruptcy Court. (See Bankruptcy Docket Entry No. 99, Appendix Document No. 34) (See also Bankruptcy Docket Entry No. 98, Appendix Document No. 34, referred above) The Committee of Unsecured Creditors by their Attorney, Douglas Campbell, on the same day, April 6, 1983, filed three additional motions, namely, the motion requesting permission for the Committee of Unsecured Creditors to engage Co-counsel in addition to Campbell and Levine, (See Bankruptcy Docket Entry No. 100, Appendix Document No. 3); the motion requesting that the District Court should give permission allowing the Committee of Unsecured Creditors Standing to Sue in regard to the alleged "fraudulent transaction", (See Bankruptcy Docket Entry No. 101, Appendix Document No. 4); and the Application for the Appointment of a Chapter 11 Trustee. (See Bankruptcy Docket Entry No. 102, Appendix Document No. 34) These three motions as well as the Motion to Withdraw the reference as to the bankruptcy case were filed in the Bankruptcy Court and under the Bankruptcy caption, namely, In Re: Jeannette Corporation, trading as Jeannette Glass, Debtor, Chapter 11, Case No. 82-3265, although all of said pleading and motions (Docket Nos. 98, 100, 101 and 102) were addressed to the Judges of the United States District Court for the Western District of Pennsylvania.

On April 7, 1983, all of these motions were referred to United States District Judge Cohill and filed in the United States District Court at Miscellaneous No. 9851.

The motion for appointment of Co-counsel was in fact an "Application" to permit the Unsecured Creditors Committee to engage the Law Firm of Mansmann,

Cindrich and Huber to act as Co-counsel with Campbell and Levine to pursue the litigation and issues arising out of "The Royal China Transfer", (this "Royal China" matter is not relevant to this opinion) and the hereinabove mentioned alleged "fraudulent conveyance" [327] which was referred to in said [327] Unsecured Creditor's Application for Co-counsel.

The United States District Court was requested to allow said attorneys a contingent fee of 33% of any and all funds recovered by them while pursuing said litigation. (See Bankruptcy Docket Entry No. 100, Appendix Document No. 3)

The contingent fee request also was assigned to the United States District Judge Cohill at Miscellaneous No. 9851. Additionally, the United States District Court was requested to give the Committee of Unsecured Creditors Standing to Sue to recover money damages for the bankrupt estate because of the alleged "fraudulent conveyance" to the defendants identified in the above-captioned case. (See Bankruptcy Docket Entry No. 101, Appendix Document No. 4) The said United States District Court was also requested to appoint a Chapter 11 Trustee. (See Bankruptcy Docket Entry No. 102, Appendix Document No. 34). All of these pleadings directed to the United States District Court were supported by certain exhibits. (See Bankruptcy Docket Entry No. 103, Appendix Document No. 34)

As above noted, on April 7, 1983, the above-referred pleading that had been filed in the Bankruptcy Court, (Pleading Numbers 98, 99, 100, 101, 102 and 103) were transferred to United States Judge Cohill. A motion to stay all proceedings in the Bankruptcy Court was then filed by the Committee of Unsecured Creditors on April 12, 1983, (See Bankruptcy Docket Entry No. 112,

Appendix Document No. 34) and the same was denied on April 13, 1983, by Judge Cohill. (See Bankruptcy Docket Entry No. 112, Appendix Document No. 34).

A briefing schedule and argument date (May 18, 1983) was set by the United States District Court involving all of the above-referred to pleadings and on June 8, 1983, Judge Cohill refused to withdraw the reference from the Bankruptcy Court and all of the Bankruptcy pleadings (including Bankruptcy Docket Entries numbered 98, 99, 100, 101 and 102) filed at Miscellaneous No. 9841, in the United States District Court were returned to the Bankruptcy Court without any action being taken. (See Bankruptcy Docket Entry No. 153, Appendix Document No. 34)

In the meantime, on May 19, 1983, after the Committee of Unsecured Creditors had requested the District Court to "withdraw the reference", (April 7, 1983) but before Judge Cohill denied the request "to withdraw the reference", (June 8, 1983) the Debtor filed a Fourth Plan of Reorganization styled, "The Third Amended Plan of Reorganization". (See Bankruptcy Docket Entry No. 145, Appendix Document No. 34)

On May 23, 1983, a hearing was begun in regard to the legal viability of the Third Amended Plan of Reorganization. (See Bankruptcy Docket Entry No. 142, Appendix Document No. 34) The hearing was continued to June 13, 1983.

On June 13, 1983, the hearing on the legal viability of the Third Amended Plan continued as scheduled, and it was decided that a further hearing would continue onto July 27, 1983, and at that time the matter of appointing a Bankruptcy Trustee for the Debtor would be considered. (See Bankruptcy Docket Entry No. 151,

Appendix Document No. 34) Also the appointment of Co-counsel and the question of "Standing to Sue" was to be considered.

On July 27, 1983, the continued hearing was convened and ended with an agreed upon Order, consented to by the Committee of Unsecured Creditors and the Debtor. (See Bankruptcy Docket Entry No. 165, Appendix Document No. 2)

The Order of July 27, 1983, reads in full as follows:

"IN THE UNITED STATES
BANKRUPTCY COURT
FOR THE WESTERN DISTRICT OF
PENNSYLVANIA
IN THE MATTER OF:
JEANNETTE CORPORATION,
t/a JEANNETTE GLASS,
Debtor
Bankruptcy No. 82-3265

ORDER OF COURT

AND NOW, to-wit, this 27th day of July, 1983;

[328] [328] IT APPEARING that a hearing has been scheduled on the objections to the adequacy of the Debtor's Disclosure Statement; and

IT APPEARING that said Disclosure Statement is in connection with a Plan of Reorganization predicated upon the sale by the Debtor of certain of its assets to Jeannette Industries, Inc. (Industries); and

IT APPEARING that Industries has withdrawn its offer to purchase said assets, as a result of which Debtor has notified the Court of its intent to withdraw the pending Plan of Reorganization and Disclosure Statement; and

IT APPEARING that various items in connection with the administration of this case have been deferred, pending the submission of the Plan of Reorganization to Creditors; and

IT FURTHER APPEARING that as a result of the withdrawal of the pending Plan of Reorganization, the administration of the within case should proceed with all deliberate speed;

NOW THEREFORE, IT IS HEREBY ORDERED, ADJUDGED AND DECREED:

1. That leave be and hereby is granted to the Debtor to withdraw the pending Plan of Reorganization; and the same is hereby deemed withdrawn; and that the objections to the adequacy of the Disclosure Statement are thereby rendered moot and the hearing on said objections is cancelled.

2. James Moody, is hereby appointed Trustee of Jeannette Corporation. The Trustee's powers shall be limited, until further Order of this Court or as provided herein, to the conducting of the sales of the assets hereinafter described. The officers of Debtor shall continue to operate its business subject to review by the Trustee.

3. That the Trustee is directed to conduct a public sale of all the Jeannette Glass Division's assets, including but not limited to: real estate, leasehold interests, machinery, equipment, inventory, moulds, dies, deposits, pre-paid expenses, accounts receivable, notes receivable due Jeannette Corporation and/or non-operating subsidiaries, books, records, customer lists, trade marks and trade names, under the following terms and conditions:

(a) That the sale shall be held on or before September 30, 1983.

(b) That the minimum price for said assets shall be $2,000,000.00. Credit shall be given to successful purchaser for accounts and notes receivable collected after the date hereof.

(c) That the sale shall be free and divested of all liens and encumbrances, including union contracts.

(d) That at confirmation the successful bidder shall deposit with the Trustee cash or certified funds in the amount of 10% of the successful bid.

(e) That such deposit shall be forfeited in the event the successful bidder fails to close pursuant to the terms and conditions of the sale.

(f) That closing on said sale shall be held within thirty (30) days after confirmation.

(g) That notice of sale shall be published in the Wall Street Journal, The Pittsburgh Press, The Pittsburgh Legal Journal, and Home Furnishings Daily.

(h) That within ten (10) days after this Order, the Trustee shall file a Complaint in proper form for the sale of the above assets free and clear of all liens and encumbrances.

4. In the event the Trustee fails to conduct such sale by September 30, 1983, his appointment shall be revoked, and a new Trustee appointed, unless the sale is postponed for reasons beyond the Trustee's control.

5. Until December 31, 1983, the Trustee shall permit the officers of the Debtor to operate Debtor's wholly owned subsidiary Royal China, Inc. (Royal) in the normal course of business with the proviso, however, that no unusual or extraordinary expenses shall be authorized without approval of this Court and that Royal shall not increase its administrative salaries or expenses beyond the level now extent.

6. The Trustee is hereby authorized and directed to
[329] solicit offers for the stock [329] and/or all underlying assets of Royal, provided, that the minimum price to be realized, after paying and/or assuming the liabilities of Royal, must be at least $500,000.00.

7. That the Trustee is directed and authorized to attempt to effectuate an agreement with both Coca-Cola Bottling Company of New York, Inc. and Pension Benefit Guaranty Corp. to release the Royal assets from their respective claims, transferring such claims to the proceeds realized from any sale of Royal.

8. In the event that by December 31, 1983, such releases are unable to be obtained, this Court shall entertain Motions to consider whether the Trustee shall be directed to file a Voluntary Chapter 11 Petition for Royal under Chapter 11 of the Bankruptcy Code in this jurisdiction, to be consolidated with this case.

9. That at any such sales held, the Court hereby authorizes the Trustee to accept bids from corporations or other entities organized by shareholders, officers and/or directors, etc. of the Debtor; provided, that such bids are in the minimum amounts as established above; the Court herein finds that such entities are qualified to bid on and/or ultimately purchase the assets of the Debtor; and that there is no impropriety or disqualification in former shareholders, officers and/or directors attempting to purchase such assets provided third parties are given fair opportunity to purchase the same at a public sale.

10. That pending the sale of the Royal assets or Royal stock by the Trustee, the Trustee shall have full and complete access to all books and records of Royal provided however, the Trustee shall not unreasonably interfere with Royal's business operations.

11. That as of January 1, 1984, the Trustee's powers shall be enlarged to include all rights, powers and duties granted to a Trustee under the Bankruptcy Code.

12. That the Application of the Committee of Unsecured Creditors to Engage Co-counsel and have Standing to Sue are hereby approved; and that a confirming Order shall be entered upon presentation of same by the Committee of Unsecured Creditors and/or its counsel. The Trustee is deemed to have joined in the Application to Engage Co-counsel, and shall join the Committee of Unsecured Creditors as co-plaintiff in the actions contemplated in the Application for Standing to Sue.

13. That the Court finds that it is premature to approve the Application for Administrative Compensation filed by Campbell and Levine, Attorneys for the Creditors' Committee, before a date is set for a hearing on application for compensation for all professional fees. However, pending such hearing, the Court directs the Debtor to pay an interim allowance to Campbell & Levine, Attorneys for Unsecured Creditors' Committee, of $20,000.00, plus costs of $1,722.43. Such interim allowance shall be credited against any fee applications subsequently approved.

/s/ Gerald K. Gibson
Gerald K. Gibson

The above Order is hereby stipulated and consented to:

/s/ _____
Douglas A. Campbell, Esq.
Campbell & Levine
Counsel for Creditors
Committee
/s/ _____
Sanford M. Lampl, Esq.
Lampl, Sable & Makoroff
Co-counsel for Jeannette
Corporation, Debtor"

It should be noted that this Order of July 27, 1983, set out in full above, appointed James Moody, as Trustee for the Debtor and directed the said James Moody to join in the "fraudulent conveyance" litigation now before this Court, (C.A. No. 83-2383) which was later filed on September 22, 1983. (See paragraph 12 of the above Order, Bankruptcy Docket Entry No. 165, Appendix Document No. 2)

Additionally, and above noted, this Order of July 27, 1983, required the Debtor to withdraw all pending Plans of Reorganization. (See paragraph one of the Order, Bankruptcy Docket Entry No. 165, set out above in full, Appendix Document No. 2)

[330] [330] By this Order (Paragraph one) the Bankruptcy Court ordered that the "Fourth Plan" of Reorganization "is hereby deemed withdrawn":

As noted above, paragraph 12 of the above Order of July 27, 1983, directs that:

> "12. That the Application of the Committee of Unsecured Creditors to Engage Co-counsel and have Standing to Sue are hereby approved; and that a

confirming Order shall be entered upon presentation of same by the Committee of Unsecured Creditors and/or its counsel. The Trustee is deemed to have joined in the Application to Engage Co-counsel, and shall join the Committee of Unsecured Creditors as co-plaintiff in the actions contemplated in the Application for Standing to Sue".

The Bankruptcy Docket Entries confirm that no suggested confirming Order ever was filed subsequently to the same, as required by this Consent Order of July 27, 1983.

The next day, July 28, 1983, the Bankruptcy Judge was presented with the same suggested Orders that had been addressed earlier to the United States District Judges and which had been refused by District Judge Cohill. (See Bankruptcy Docket Entries numbered 100, 101, 153) wherein a 33% contingent fee agreement (Docket Entry No. 100) was suggested and wherein Standing to Sue by the Committee of Unsecured Creditors was suggested. (Docket Entry No. 101) (See Appendix Document Numbers 2, 3, 4 and 34)

There is absolutely nothing in the record to even suggest that any of the interested parties (other than Douglas Campbell, the attorney for the Unsecured Creditors Committee) consented to or were even aware of Judge Gibson's Contingent Fee Order of July 28, 1983, until after it was entered. Said suggested contingent fee order of July 28, 1983, was certainly not the "confirming order" required by Judge Gibson's Order of July 27, 1983. As noted earlier in this factual narrative, the "contingent fee order" signed by Judge Gibson on July 28, 1983, was not even addressed to Judge Gibson. Said suggested Order already had been addressed to and refused by the United States District Judge Cohill. (See

Bankruptcy Docket Entry No. 100 and 101, Appendix Document Numbers 3 and 4) Further, said "Contingent Fee Order" was never time-stamped by the Bankruptcy Clerk and was never mailed to interested parties. The "Contingent Fee Order" reads as follows:

"IN THE UNITED STATES
BANKRUPTCY COURT

FOR THE WESTERN DISTRICT
OF PENNSYLVANIA

IN RE:

JEANNETTE CORPORATION,

t/a JEANNETTE GLASS,

Debtor

Chapter 11

Case No. 82-3265

ORDER

AT PITTSBURGH, in said District, this 28th day of July 1983, upon consideration of the foregoing Application of Committee of Unsecured Creditors to the District Court to Engage Co-Counsel, it is hereby ordered, adjudged & decreed that the Committee of Unsecured Creditors be and hereby is granted leave to engage the law firms of Campbell & Levine and Mansmann, Cindrich & Huber as its legal counsel to pursue the litigation and issues arising out of the Royal China Transfer and the alleged Fraudulent Transfer referred to in said Application, on the following basis:

a. A Contingent fee of 33% of any and all funds recovered by them while pursuing the litigation and issues arising out of the Fraudulent Transaction and/or the Royal China Transfer;

b. Reimbursement of any and all out-of-pocket direct expenses and costs incurred by them while pursuing the litigation and issues arising out of the Fraudulent Transaction and/or the Equal China Transfer; but

331] [331] c. Subject to the provisions of 11 U.S.C. §328, that the Court may allow compensation on a different basis if such terms and conditions prove to have been improvident in light of developments not anticipated at the time of fixing such terms and conditions.

/s/ Gerald K. Gibson"

According, to the Trustee's assessment, the "fraudulent conveyance" case has the potential to generate almost 36 million dollars, which gives the attorneys Campbell and Levine and Mansmann, Cindrich and Huber the potential to receive a twelve million dollar legal fee if interest on the delayed receipt of damages is included in the recovery.

At the time of the entry of the "Contingent Fee Order" by Judge Gibson, on July 28, 1983, there was a cash balance of $1,615,492.42, in the bankrupt debtor's account, and by April 8, 1987, (See Bankruptcy Entry No. 553, Appendix Document No. 36) there was $2,210,000.00, in cash in the bank. The cash balance on the 31st of October 1986, was $2,192,691.90. (See Bankruptcy Docket Entry No. 446, Appendix Document No. 24)

As of October 7, 1987, Campbell and Levine have claimed fees in these cases in the amount of $341,515.70, and have received at least $195,471.47, on their account plus $3,162.31 in expenses. (See Appendix Document No. 25)

As of October 7, 1987, Mansmann, Cindrich and (Huber) (Titus) have received in expenses *only* in the "fraudulent conveyance" litigation the sum of $141,793.88. (See Appendix Document No. 25)

The Debtor's Trustee, James Moody, and his accounting firm as of October 7, 1987, have claimed $323,942.85, and have received $243,383.15, on their account. (See Appendix Document No. 25)

The total claimed professional fees and professional expenses to October 7, 1987, in this case amount to over one million dollars. (See Appendix Document No. 25)

The Debtor has taken exception to the amount of fees and expenses charged by the Trustee and his attorneys. (See Bankruptcy Docket Entry No. 1321, Appendix Document No. 26)

On the other hand, the Debtor's attorneys have received fees of at least $235,000, (See Appendix Document No. 25) and the Trustee has taken exception to the payment of these fees. (See page 12 of Appendix Document No. 6 as follows:)

> "Also pending is the Trustee's Motion to have the attorneys who represented the Debtor in this case return the approximately $235,000 they were paid from the estate—primarily by the Debtor-in-Possession—on the grounds that they violated their duty of loyalty to the estate and its creditors by seeking to protect the adverse interests of J. Corp./J.P. Brogan while nominally representing the bankruptcy estate."

On July 30, 1986, Moody, the Debtor's Trustee, filed the "Fifth Plan of Reorganization" in this case. This "Chapter 11 Plan" is admittedly a plan for the

liquidation and distribution of all of the Debtor's assets. (See page 25 of the Trustee's Disclosure Statement, Bankruptcy Entry No. 374; Appendix Document No. 6)

At Page 18 of said Trustee's Disclosure Statement, (Appendix Document No. 6) the Trustee states in regard to the "fraudulent conveyance litigation" that, "a seven figure settlement offer has already been made by the dependents, (sic defendants) but was refused."

It is to be noted, that prior to the Trustee's and Trustee's Attorneys' refusal of the "seven figure settlement offer," there was no presentation of the settlement offer to the Unsecured Creditors for their consideration and/or rejection or approval, and there was no hearing scheduled or presentation of the offer of settlement to the Bankruptcy Court for its consideration and/or approval.

Attorney Campbell at the December 9, 1986, Bankruptcy Court hearing on the Trustee's motion to approve the Trustee's Reorganization and Trustee's Disclosure Statement, said the following:

> "Sure, we're on a contingent fee. But if we
> [332] didn't—our interests are consistent [332] with the creditors, and that's one thing the debtor's counsel can't say. They represent the defendants in that litigation. If we thought that $1,250,000.00 was what the case was worth, we'd settle it for $1,250,000.00, but it's worth far more than that. And I can say that because I have a vested interest in the outcome. I have a big interest in that case. One third of $1,250,000.00 is nothing to sneeze at. And if I thought that that was anywhere near ballpark, I'd seriously entertain it. But I consider it an afront. It's not a serious offer. It's an attempt to pull one over one over on the creditors, and I think

that's indicated by the fact that they put—part of this program was to consider, hurry up and give away your rights; this limited offer expires on December 31, 1986."

The next day, December 10, 1986, after the above-mentioned of Attorney Campbell, the Trustee's attorney, the Debtor's attorney, Sanford M. Lampl, sent an unfiled letter to the Bankruptcy Judge Markovitz (with a copy to Attorney Campbell and assured the Judge that the offer of settlement in the amount of $1,250,000.00 would remain in full force until the creditors were given a chance to vote on said offer of settlement. (See the Lampl letter offer of settlement, Appendix Document No. 17)

In response to the charge of the Debtor's attorneys, that the Trustee was concealing the details of the offer of settlement, (which offer the Trustee and his Attorney Campbell had already refused without the knowledge and/or consent of the many Unsecured Creditors) said Trustee suggested a supplement to the Trustee's Disclosure Statement, by offering to inform the Unsecured Creditors about the fact that an offer to settle the "fraudulent conveyance litigation" for $1,250,000.00, had been made to the Trustee, however, the Unsecured Creditors were not given an opportunity to approve said settlement offer for the reason that said offer of settlement had already been rejected by the Trustee and Trustee's attorneys. (See Bankruptcy Docket Entry No. 447; Appendix Document No. 7, and Bankruptcy Docket Entry No. 374; Appendix Document No. 6, at Page 18) (See also Page 43 of the hearing transcript of December 9, 1986, where Attorney Campbell readily admits that he has a vested personal financial interest in the outcome of the litigation and that he, Attorney Campbell was admittedly motivated by personal financial

considerations when he unilaterally rejected the defendant's offer to settle the "fraudulent conveyance litigation" for $1,250,000.00, without advising or consulting with the Unsecured Creditors who are the real parties in interest)

On November 10, 1986, the Debtor, Jeannette Corporation filed a "Sixth Plan of Reorganization" along with a Disclosure Statement. (See Bankruptcy Docket Entries Nos. 418 and 419; Appendix Document Nos. 9 and 10)

On pages 2 and 26 of the Debtor's Disclosure Statement, (See Bankruptcy Docket Entry No. 418; Appendix Document No. 10) it is acknowledged that both the Debtor's Plan (Sixth) and the Trustee's Plan (Fifth) require a liquidation of all of the Debtor's assets and the ultimate result of both plans is quite similar to what would happen in a Chapter Seven Liquidation. It is an undisputed fact, that both the Trustee's Plan of Reorganization and the Debtor's Plan of Reorganization contemplate the complete liquidation of all of the Debtor's assets and that there is absolutely no chance and/or hope that the Debtor will be rehabilitated.

At page 2, of the Debtor's Disclosure Statement (Appendix Document No. 9) is the following:

> "The Debtor's plan is one of two plans pending before the Court. The essential difference between the two plans is that the Debtor's plan would guarantee payment of $1,250,000.00 to the estate for satisfaction of claims (in settlement of the Trustee's lawsuit against various parties), while the Trustee's plan would continue that lawsuit to a conclusion, so that no return to creditors will occur unless the Trustee wins the lawsuit and collects a judgment. The Debtor expects that the Settlement Sum of

> $1,250,000.00 could, based upon the Trustee's own
> 33] "conserva- [333] tive estimates" provide for payment of 15%—20% on creditors general unsecured claims totaling approximately $6,000,000 to $8,000,000—before allowing for sums that might be allowed to the Trustee's counsel in the District Court Litigation. See p. 14, infra. An allowance of 33⅓% of the Settlement Sum to such counsel could reduce the dividend to approximately 10%."

Additionally, at page 26, of said Debtor's Disclosure Statement, (Appendix Document No. 9) is the following:

> "There can be no distribution to unsecured creditors in a Chapter 11 without a confirmed Plan of Reorganization. Because the Plan essentially provides for the liquidation of all the Debtor's assets and the distribution of the proceeds, it is quite similar to what would happen in a Chapter 7 liquidation."

On November 25, 1986, Debtor's attorney moved for an expedited hearing for the approval of Debtor's Disclosure Statement, (See Bankruptcy Docket Entry No. 428; Appendix Document No. 15) and on December 2, 1986, Douglas Campbell, the Trustee's attorney filed objection to said motion for an expedited hearing. (See Bankruptcy Docket Entry No. 430) The following day, December 3, 1986, Debtor's attorneys, Lampl and Pappone, did the following:

> (a) Moved the Bankruptcy Court to approve the Debtor's Disclosure Statement; (See Bankruptcy Docket Entry No. 431, Appendix Document No. 11)
>
> (b) Debtor's attorneys filed their objections to the Trustee's Disclosure Statement; (See Bankruptcy Docket Entry No. 432, Appendix Document No. 8) and

(c) Debtor's attorneys evidently filed a copy of a proposed Debtor's Amended Disclosure Statement and distributed the same to the attorneys of record. (See Appendix Document No. 12) [Note: The Debtor's Amended Disclosure Statement (the Seventh Disclosure Statement filed in this case) was found in the Bankruptcy Court files, (See Appendix Document No. 12) but there is no Docket Entry number assigned to this document. However, the Employee Creditors filed an objection to this Debtor's Amended Disclosure Statement (Appendix Document No. 12) and referred to it as though it properly had been filed of record. (See Bankruptcy Docket Entry No. 519, Appendix Document No. 13)]

In the meantime, by an Order dated November 4, 1986, (See Bankruptcy Docket Entries Numbers 413 and 424, Appendix Document No. 14) the Bankruptcy Judge set December 9, 1986, as the date for a hearing on the Trustee's Disclosure Statement, but the Bankruptcy Judge without any plausable explanation refused to hear the matter of the Debtor's Disclosure Statement on the same day, (i.e. December 9, 1986) although said Bankruptcy Judge was formally requested to do so on two separate occasions.

The Debtor's motion and very reasonable request for a hearing on its Disclosure Statement on December 9, 1986, at the same time as the hearing on the Trustee's Disclosure Statement was to be held, reads as follows:

"3. On or about October 15, 1986, the Trustee filed a proposed Disclosure Statement and pursuant to Order dated November 4, 1986, a hearing on the Trustee's Disclosure Statement is currently scheduled for hearing on December 9, 1986 at 11:00 a.m.

4. On or about November 5, 1986, Debtor filed its own Disclosure Statement and as of November 25, 1986, no hearing has been scheduled by the Court in connection therewith.

5. In the interest of judicial economy and in order to avoid any confusion among creditors with respect to the competing Disclosure Statements and Plans, a hearing in connection with the Debtor's proposed Disclosure Statement should be simultaneously held with the hearing on the Trustee's Disclosure Statement so that solicitation and balloting can be coordinated and costs and confusion kept to a minimum.

6. There will be no prejudice to creditors and other parties in interest by the holding of an expedited hearing on Debtor's proposed Disclosure Statement.

[334] [334] WHEREFORE, Debtor respectfully prays that this Honorable Court hold a hearing in connection with Debtor's Disclosure Statement on December 9, 1986 at 11:00 a.m. or as soon thereafter as suits the convenience of the Court together with such other and further relief as may be just and proper."

As heretofore noted, the Bankruptcy Judge, without offering any plausable reason or explanation, refused to hear about the legal efficacy of the Debtor's Disclosure Statement which set forth the view contrary to that of the Trustee to the effect that the "fraudulent conveyance" litigation possibly could be lost by the Trustee; that the defendants in said litigation had alleged reasonable and legally viable defenses to the Trustee's claims of "fraudulent conveyance" in said

litigation; and that an offer to settle this "fraudulent conveyance" litigation for $1,250,000.00, should be seriously considered by the "Unsecured Creditors" when and if they cast their votes for or against the two competing Reorganization Plans.

In passing, it might be noted that this District Court delayed the trial of this "fraudulent conveyance" litigation for a long period of time in order to be guided by the result in the "Gleneagles" case, which has some similarity to this case at bar and was also involving a leveraged buyout transaction and alleged violations of various sections of the Pennsylvania Fraudulent Conveyance Act.

> "See 803 F.2d 1288 (3d Cir. 1986). The Gleneagles cases are: *United States v. Gleneagles Inv. Co.*, 565 F.Supp. 556 (M.D.Pa. 1983) (Gleneagles I); *United States v. Gleneagles Inv. Co.*, 571 F.Supp. 935 (M.D.Pa. 1983) (Gleneagles II); *United States v. Gleneagles Inv. Co.*, 584 F.Supp. 671 (M.D.Pa. 1984) (Gleneagles III); and *United States v. Tabor Court Realty Corp.*, 803 F.2d 1288 (3d Cir. 1986), cert. denied sub nom. *McClellan Realty Co. v. United States*, _____ U.S. _____, 107 S.Ct. 3229 [97 L.Ed.2d 735] (1987). For the sake of convenience the cases will be jointly referred to as Gleneagles."

This Gleneagles case was not concluded until June 22, 1987, some months after the last two competing Plans of Reorganization had been filed by the Trustee (the Fifth Plan filed) and by the Debtor (the Sixth Plan filed) (See Appendix Documents Nos. 5, 6, 7, 9, 10 and 12) and after four issues had arisen in this Bankruptcy case,

> (a) concerning the Bankruptcy Court's approval and/or disapproval of the competing Disclosure Statements;

(b) concerning the necessity of submitting the settlement offer to the Unsecured Creditors for their approval;

(c) concerning the issue as to whether some 16 million dollars to 18 million dollars of claims of former active and retired employees were time barred; and,

(d) concerning the issue whether this entire bankruptcy matter should be converted from Chapter 11 to Chapter 7 of the Bankruptcy Code. (the fourth issue is now being considered by this District Court)

Because of these four above-mentioned issues were outstanding and unresolved both prior to and after the Gleneagles decision and up to the date of this very opinion and order of this court now being written by this District Court regarding the fourth issue, and despite the claims, assertions and demands of the plaintiffs' attorneys for an immediate trial, this "fraudulent conveyance" litigation could not have been brought to trial legally, fairly and properly until these above-mentioned four issues were resolved in some manner by this District Court. [(See the motion of the Trustee to the District Court dated July 10, 1987, for an Order setting a trial date) (See "fraudulent conveyance", Civil Action Docket No. 83-2383, Entry No. 393; Appendix Document No. 27); See also defendant's response to that motion addressed to the District Court requesting a trial date, "fraudulent conveyance", Civil Action Docket No. 83-2383, Entry No. 394, Appendix Document No. 28; and See also Trustee-Plaintiff's motion to the District Court requesting a status conference "fraudulent conveyance",
[335] Civil Action Docket No. 83- [335] 2383, Entry No. 399; Appendix Document No. 29)]

On December 9, 1986, and as above-noted, the Bankruptcy Judge held a "Disclosure Statement hearing" *only* on the Trustee's statement and said Bankruptcy Judge refused to address the legal efficacy of the Debtor's Disclosure Statement, although requested to do so on two prior occasions.

The entire transcript of said Bankruptcy Court hearing of December 9, 1986, is set forth as Appendix Document No. 16; See also Bankruptcy Docket Entry No. 461.

However, for the convenience of this District Court, the following portions of the December 9, 1986, Bankruptcy Court hearing for the Trustee's Disclosure Statement are set forth in these factual findings as follows: *Mr. Pappone at pg. 29 of transcript:*

"What we have here is a rather uncharacteristic activity on the part of the Trustee that theoretically should want to get this matter forward; should theoretically want to get the ratification of his desire to go forward with that litigation by the creditors, and that can only happen if they're given the choice. And that's what we're trying to do today.

"As far as delays are concerned, I think the record should reflect that our Plan was sent into Court on November 7th before, in fact, the mails possibly could have caused the November 4th Notice of the Trustee to reach me in Boston. And, yes, our Plan was a response to the Trustee's Plan, but it was not a response that was artificially delayed to take advantage of any kind of a scheduling game. Indeed, my cover letter on my Plan pleads with the Court to set them down for the same time. And I appreciate, because I read the Wall Street Journal on the plane this morning here that the dockets of bankruptcy courts are crowded and we've got a lot of problems. It's the front page story. One can't really live

in a cocoon concerning that. But there really is time to give the creditors side by side choice of whether to go hell bent for election or pursuit of the District Court litigation or to accept $1,250,000.00 in settlement of that litigation. And the precedent of embodying settlements of litigation in reorganization plans is well founded. Continental Mortgage Investors was a three quarter of a billion of a dollar real estate investment trust, and settlement of the senior creditors claims to that fund were settled in the context or pre-planned activity and further in connection with an ultimate Plan of Reorganization. So there's nothing really wrong with that. In fact, it's the most expeditious way to get money to the civilians. And that's all we're really looking for here today. In fact, if the Court were to agree to get our disclosure statement on for prompt approval, let the people file whatever objections they want. And, by the way, Mr. Campbell has had it since we filed it with the Court, it went to him simultaneously by hand, if I remember correctly. There was no five day delay in submitting it to him after it was filed with the Court. No attempts to keep secrets here. That would give the creditors the opportunity to make their choice, and it would render a little less crucial some of the otherwise well founded objections that I have to make to his disclosure statement. And, frankly, I would move now for a continuance of this matter until my disclosure statement can be properly noticed out by the same mailing matrix as Mr. Campbell's and give Mr. Campbell the opportunity that is now 30 days old for him to file objections to it or to engage me in some kind of combat over what he thinks it ought to say to be more accurate or more helpful to creditors making a choice. But, frankly, I think that both of our disclosure statements read a little bit like an argument in favor of a plan, and

they probably should. And taken together you probably don't have to fine tune them too awfully much. I do have my objection to his. I'm sure he's going to have his objections to mine. But between the two, they go out together, the creditor is going to be able to read one, he's going to be able to read the other, he's going to see that a substantial portion of the debtor's plan mirrors and aids Mr. Campbell's clients' plan word for word, number for number, and it comes down to one essential difference, which I just can't stress enough as being the
336] only [336] sensible way for us to handle the overall wrap up of this otherwise and heretofore chaotic case. I wonder if the Court would like to consider that in terms of the time frame we're looking at here.

"THE COURT: I want to hear your other objections as well.

"MR. PAPPONE: Okay, fine. I'll go straight to those. I really don't think that in all candor—

"THE COURT: Well, you're saying that we should somehow or another prepare a new document incorporating the two disclosure statements, bringing the additional fact that should maybe go to the creditors is that there's an offer on the table of $1,250,000.00 and maybe give them the option of saying go forward with the litigation or don't go forward, settle or—

"MR. PAPPONE: If you'll permit me, I'm saying the exact opposite.

"THE COURT: I'm sorry.

"MR. PAPPONE: I said, his disclosure statement now more or less as it is, let stand the debtors disclosure statement now more or less as it is—

"THE COURT: I don't see that a normal reasonable everyday creditor is going to be able to read two such novels. I think if anything, it's going to put them to sleep.

"MR. PAPPONE: Judge, please believe me, there's no way on God's Green Earth that you're going to, other than writing it yourself, get a disclosure statement that represents a meeting of the minds of these two sides in this courtroom. This battle has been going on for four very bitter years. The only sensible way to do it is to just cut it and let the chips fall where they may. It's very easy in a summary letter to say that basically one plan provides for a settlement to that litigation and you give up your chance to go for the gold and the 100 cents on the dollar, and the other one gives you a settlement. Let us know whether you can live with it. It's very simple. Whether a creditor needs to wade through all those pages to get to that bottom line, I don't know. But I do think that if you're giving somebody a choice you have to give both sides' arguments in favor of why they ought to take that choice. Mr. Campbell argues he's got a good case, solid District Court litigation. They ought to go with him because he's got precedent. The debtor is saying the facts aren't similar at all, there's never going to be a meeting of the minds, it's going to get appealed, it's going to go on for a substantial period of time because you've got very well financed, very well heeled counsel for each one of the defendants of that litigation. I think you have to let both sides tell their story. I honestly feel that it would be wrong to cut either side off from having the opportunity to, if you will, make their pitch to the creditor body out there. I think you need two disclosure statements, and whether somehow or another we can spend a lot of legal time for a result that maybe you'd have a common position and you'd have a

three or four page advocacy piece that went along with the common position, it's up to the Court. Maybe something like that is possible, but you've got clocks ticking here at the expense of those creditors. They've already spent a substantial amount of time on this disclosure statements. I really question whether it makes sense to compensate Mr. Campbell and the other several attorneys in his firm who are here with him today to rewrite it in such a way that it's appropriately sanitized and maybe loses the punch that they originally wanted to have. *As Mr. Campbell knows, as the Court is well aware, I'm being compensated by outside forces, indeed accurately stated and being—the estate doesn't have money to pay another debtor's counsel, frankly, what it boils down to. And I'm simply not willing to work on a contingency before the Court with respect to that. And I undertook the engagement to get this other side of the story told on behalf of the debtor by the debtor's principals and by its major shareholders, who coincidentally, let there be no secret, happen to be defendants in District Court litigation. And I'm perfectly willing to let my disclosure statement and any materials that go out with it reflect that I'm being compensated for doing this work not out of the goodness of the Court's heart or any recognition under 503(b) 3D concerning*
[337] *substantial contribu-*[337]*tions to the estate, but by people who have an axe to grind concerning moving this estate along and getting an opportunity to the creditors to choose. I don't know who can speak for the debtor, but those chosen by its principals and by its shareholders to speak for it. And I'm not here to keep any secrets concerning who they are or what they're paying me. And I've had no problem saying that in the disclosure statement. I have no problem with the creditors having that as an overall gloss to the perspective from which*

*I'm making my argument. The same way that Mr. Campbell has no secret that he's out there gunning for a 33 and ⅓ percent contingency fee, which could make a person very comfortable if it could be held.*

"THE COURT: So you're proposing two disclosure statements with two letters, a letter attached to each disclosure statement, and somehow have a ballot prepared wherein the parties can decide which way they want to go.

"MR. PAPPONE: Exactly, I've done it before, Your Honor. I'm not inventing anything new here. I mean it's nice. The ballot says, do you want a Plan A or Plan B, or do you want to elect to vote for both of them and then give your preference.

"THE COURT: And each side in their disclosure statement can put forth their best possible foot, you know, say what they want to say about their position, say what they want to say about the other side's position.

"MR. PAPPONE: Absolutely.

"THE COURT: Then allow the creditors to decide whether this case goes forward there or does not.

"MR. PAPPONE: Exactly. It's certainly possible. I just try to conceive of all the horrible hypotheticals we were trained to think of in our first year of law school. It's possible they reject both plans. And then we probably have to come up and say, well, maybe one million two-fifty isn't good enough. We had a pretty good response, let's say, to a million two-fifty but it was a few votes short. Let's find a way to sweeten it up just enough to get those votes, and I'll go back to those defendants and I'll say, fellows, if you want to sell this to the creditors it's going to cost you more, and we want

that money and we're going to notice the thing out again and I'll try to sit down with Mr. Campbell and his side, and once those votes are tallied up and he sees which way the winds are blowing—this is purely, you know, this is total speculation. If he sees that the winds are blowing fairly strongly in favor of a settlement in that range, maybe that's where we go and wrap this up. But at that point additional negotiations could take place.

"With respect to getting a Plan confirmed so priority payments could be made, let the debtor's position be very clear on that. The debtor claims none of that money. Debtor's counsel probably, who is being compensated only by out of the funds of the estate, Mr. Lampl's office, probably would like to see some of the Chapter 11 expenses taken care of. I have no problem scheduling an Order for the payment of priority claims to these people. Let's have a time frame within which to object to claims, and let's pay the priorities out, and then let's simply notice out, holding the $130,000.00 or however much Mr. Campbell thinks is necessary for unallowed counsel fees, we'll have a plan where everybody is out of the way except the general unsecured creditors. (*italics supplied*)

"*THE COURT AT PG. 42, LINE 9, OF THE TRANSCRIPT:*

"THE COURT: How do you respond to the argument that the parties ultimately voting on this Plan should know about this offer of $1,250,000.00 and maybe have the option of saying enough of that, we'll take twenty cents on the dollar?

"MR. CAMPBELL: The offer expires on December 31st, 1986. It will be gone before anybody could have it.

"MR. PAPPONE: I think this offer might be extended. Just need some kind of a sign, Judge. Let's let the creditors decide that. (NOTE: Attorney Lampl letter of 12/10/86 making unequivocal and extended offer to settle the "fraudulent conveyance case" for $1,250,000.00. See Appendix No. 17).

[338] [338] "MR. CAMPBELL: Well, it expires on December 31st, 1986 by its terms, and I haven't see—I haven't seen anything that binds anybody to honor it even if it's extended. I don't know who is putting up this money. What is it? What's the source for funding of this Plan? It's pretty vague. It's about as vague as Mr. Pappone's description, original description of the source of his compensation in this case, affiliates of the debtor or something. What are we going to get next, a notice of intent to amplify a source of funding the Plan. It's the same pattern over and over again. We're ready to go with the Plan that does exactly what he describes that takes care of all the priority stuff. And then we go off and we'll take care of the litigation. *Sure, we're on a contingent fee. But if we didn't—our interests are consistent with the creditors, and that's one thing the debtor's counsel can't say. They represent the defendants in that litigation. If we thought that $1,250,000.00 was what that case was worth, we'd settle it for $1,250,000.00, but it's worth far more than that. And I can say that because I have a vested interest in the outcome. I have a big interest in that case. One third of $1,250,000.00 is nothing to sneeze at. And if I thought that that was anywhere near ballpark, I'd seriously entertain it. But I consider it an afront. It's not a serious offer, its an attempt to pull one over one over on the creditors, and I think that's indicated by the fact that they put—part of this program was to consider, hurry up and give away your rights; this limited offer expires on December 31,*

*1986. I think that gives us all a pretty strong indication of the quality, the character of this offer, whoever is making it.* We don't even know, your Honor. And then if we go through, you know, the particular objections they concocted to the disclosure statement, you can see what the motive was here. It was just to throw something up to delay the process. It's become frustrating, this case, to the Trustee and to his counsel. But we're going to persevere. And we've got—our time has come to put out something to the creditors and let them see if they want it. There's no offer here. It expires and no one has told us where it's coming from, and no one has bound themselves to honor that.

"If you'd like, your Honor, I can go through their objections. I think it may cast some light on just where the debtor is coming from again. It's all illusions." (*italics supplied*)

On December 18, 1986, the Bankruptcy Judge wrote a Memorandum Opinion and Order which approved the Trustee's Disclosure Statement and said Bankruptcy Judge ignored the Debtor's Disclosure Statement although it realistically addressed the deficiencies in the Trustee's "fraudulent conveyance" case, and said Bankruptcy Judge especially ignored and did not discuss the fact that the Trustee and his attorney, Douglas Campbell, unilaterally, (and without any discussion and/or input from the Unsecured Creditors and without any hearing on the subject of settlement before the Bankruptcy Judge) had completely rejected the defendant's offer to to settle the "fraudulent conveyance" case for $1,250,000.00, and in a situation where Attorney Campbell would have a difficult time in giving his client, the Trustee, objective and dispassionate advice after he, Campbell openly admitted on the record

to a very great personal and immediate vested financial interest in the outcome of said "fraudulent conveyance" litigation. (See italicized exerpts from the transcript (Appendix Document No. 16) set forth above in this factual history) (See also this Memorandum Opinion of the Bankruptcy Judge, Bankruptcy Docket No. 448; Appendix Document No. 18).

On December 22, 1986, the Debtor appealed to this United States District Court, the order and decision of the Bankruptcy Judge approving the distribution of the Trustee's Disclosure Statement to all of the parties in interest. (Especially all Unsecured Creditors) (See Bankruptcy Docket Entry No. 453; Appendix Document No. 19)

On January 14, 1987, this United States District Court withdrew the reference from the Bankruptcy Court as to
[339] all matters pertaining to the Trustee's Disclosure [339] Statement and Plan of Reorganization and as to all matters relating to the Debtor's Disclosure Statement and Plan of Reorganization, and the Bankruptcy's Judge's Order of December 18, 1986, was stayed. (See Appendix Document No. 18, Bankruptcy Judge's Order) (See also Civil Action No. 87-268, related to Civil Action No. 83-2383, "fraudulent conveyance" litigation; Appendix Document No. 20)

On February 2, 1987, Attorney Beard filed a motion on behalf of the Unsecured Active and Retired Employees to convert the Bankruptcy case from Chapter 11 to Chapter 7. (See Bankruptcy Docket Entry No. 496; Appendix Document No. 22)

On March 10, 1987, this United States District Court withdrew the reference in regard to the Employees' Motion to Convert the Bankruptcy case from Chapter 11 to Chapter 7 of the Bankruptcy Code. (See U.S. Court

Civil Action No. 83-2383, Docket Entry No. 385; Appendix Document No. 23), and this District Court in this Opinion is addressing said motion at this time.

This above-mentioned withdrawal of reference by this District Court's Order of March 10, 1987, as to the "conversions" issue was filed and acted on by this District Court, prior to the March 26, 1986, scheduled hearing to address the conversion issue in the Bankruptcy Court. (See Bankruptcy Docket Entry No. 514, entered on February 20, 1987, and the Bankruptcy Docket Entry filed on March 26, 1987, and numbered W/519, wherein a hearing in the Bankruptcy Court on the Motion to Convert was not held because the United States District Court had withdrawn the reference prior to the scheduled date of the hearing on said Motion to Convert)

The Trustee responded on January 6, 1988, to the Hourly Employees' Motion to Convert by filing a motion with the United States District Court to extend the "Bar Date" (i.e. the last day for filing claims against the Debtor) from October 31, 1983, (See Bankruptcy Docket Entry No. 97, entered March 31, 1983) to some appropriate time in the future in lieu of conversion to Chapter 7. (See C.A. No. 83-2383, Docket Entry No. 406; Appendix Document No. 31)

The "Brogan" defendants responded to the Trustee's Motion to Extend the "Bar Date" by opposing said motion in a "Joint Memorandum". (For a copy of the same See Appendix Document No. 32)

In their response at Page 2, to the Trustee's argument, that conversion would eliminate the Trustee and his counsel from the case (at least temporarily since the Trustee and his counsel could be reappointed by the

United States Trustee if the case were converted to Chapter 7) the Brogan defendants respond that "... no attorney is worth retaining at the risk of opening up the estate to $16,000,000.00, of potential claims".

To date, the Debtor, Jeannette has scheduled 882 pre-petition unsecured trade creditors whose claims total $4,174,224.00.

In or about June 1983, PBGC (Pension Benefit Guaranty Corp.) filed certain claims (the "PBGC Claims") against the estate of Jeannette Corporation. Claim No. 428 is for $193,368; No. 429 is for $6,800,000; No. 430 is for $538,528, and No. 431 is for $126,884. ("PBGC Claims" are made by the Pension Benefit Guaranty Corporation)

Additionally, the former hourly employees of Jeannette have filed certain claims against the estate of Jeannette (the "Employee Claims") in the amount of $579,789.99, (Claim No. 549) and the amount of $396,000, (Claim No. 535). On October 26, 1987, new employee claims numbers 639 and 650 were filed after the bar date of October 31, 1983, in the amounts of $2,263,785.62, and $14,949,661.96, respectively.

Proof of claim No. 640, filed by the Union on behalf of the 732 Active Employees in the total amount of $14,658,870.20, reflects total vacation pay claims of $675,669.82, of which $169,241.53, constitute priority claims and the remaining $506,482.29, represent non-priority unsecured claims.

In passing it is well to note that of the 903 active employees only 698 are represented by Union counsel Attorney Beard, and have filed claims; 34 active
[340] employees [340] have filed claims but are not represented by counsel; and roughly 169 or 163 active employees are

not represented by counsel and have not filed claims representing potential additional claims of approximately $3,000,000.00. (See Appendix Document No. 21)

Of 242 retirees only 39 failed to request representation by counsel. Again roughly 16% of the retirees have not filed claims representing potential additional claims of roughly $45,000.00. (See Appendix Document No. 21)

At present there are 2,027 potential individual claims of Unsecured Creditors (242 Retirees; 903 Active Employees; 882 Unsecured Trade Creditors) in the alleged but not verified amount of approximately twenty-three million dollars.

Additionally, Calvin D. McCracken, as Chairman of the Employees Committee, has filed general employee claims for loss of employment at Claim No. 586, for over twenty-nine million dollars. (See Bankruptcy Docket Entry No. 718, of April 9, 1987; Appendix Document No. 34, page 17)

In fact, since a sizable group of employees still have not presented their claims to the Trustee, (See discussion of this matter in the Opinion that follows this "factual statement", their additional claims could increase to over eighteen million dollars if the "bar date" is extended.)

In the light of these facts as above found by this District Court, this District Court must and will conclude for reasons set forth in the Opinion which follows, that in the interest of reducing much unnecessary expense of litigation; in the interest of expediting the conclusion and completion of the "fraudulent conveyance" litigation, and the liquidation of the Debtor's estate; in the interest of reducing the inordinate delay that has beset this "fraudulent conveyance" litigation and to reduce delay in the final

distribution of the Debtor's assets; and above all in the interest of fairness and justice to all of the interested parties, this matter shall be converted from Chapter 11 to Chapter 7 of the Bankruptcy Code.

## CONCLUSIONS OF LAW

This Bankruptcy case, in Re: Jeannette Corporation, now filed under Chapter 11, of the Bankruptcy Code (The Corporate Reorganization Section) based upon the undisputed facts, should be converted to a Chapter 7 case (Liquidation Section) for the reasons hereinafter set forth in this Court's Opinion.

## OPINION

(NOTE: Because it is vital to the ongoing prosecution of this litigation, (in regard to converting this bankruptcy matter from Chapter 11 to Chapter 7, of the Bankruptcy Code) both in the Bankruptcy Court and in this District Court, that the enclosed Findings of Fact, Conclusions of Law and Order of this Court should be filed with the Clerk of the United States District Court immediately, this District Court's Opinion which is very lengthy) in support of the aforementioned Order of this Court, will be filed with the Clerk of this District Court within fifteen (15) days of the date of this Order of Court which is attached hereto.)

## ORDER

AND NOW, this *15th* day of MARCH, 1988, for the reasons set forth in the hereinafter filed Opinion of this Court, and after oral hearing, argument of counsel and briefs of counsel and after taking judicial notice of the record and the undisputed facts set forth in the Docket Entries and supporting pleadings, transcripts and orders

both in this United States District Court and in the United States Bankruptcy Court, (See particularly the Two Volume Appendix attached hereto and made a part hereof by reference) IT IS THE ORDER OF THIS COURT, that the above-captioned bankruptcy matter shall be and is immediately converted from Chapter Eleven of the United States Bankruptcy Code, as amended, to Chapter Seven of the same.

Because the Committee of Unsecured Creditors has no standing to sue in the above-captioned "fraudulent conveyance litigation" filed in this District Court as Civil
[341] [341] Action No. 83-2383, and for the reasons to be set forth in the Opinion of this Court to be hereinafter filed at said Civil Action No. 83-2383, in support of this within Order, the Committee of Unsecured Creditors is removed as a Plaintiff in the above-captioned "fraudulent conveyance litigation"; further, the caption of said case (Civil Action No. 83-2383) shall be amended accordingly; further, the so-called 33% contingent fee order entered by the Bankruptcy Court, at Bankruptcy No. 82-3265, on July 28, 1983, is vacated ab initio and said "contingent fee agreement" shall not be given any legal force or effect whatsoever.

FURTHER, the Law Firm of Campbell and Levine and the Law Firm of Mansmann, Cindrich, Huber and Titus are removed as attorneys in this case as a matter of law because of the conversion to Chapter 7 and for reasons set forth in the hereinafter filed Opinion of this Court.

Because of the complexity of the above-captioned "fraudulent conveyance" litigation and because former counsel is very familiar with the same after almost five years of litigation, this District Court very reluctantly recommends that the Law Firms of Mansmann, Cindrich and Titus and Campbell and Levine be retained to

conduct the "fraudulent conveyance" litigation. Further, this Court recommends that James Moody be retained as Trustee. However, these law firms and the Trustee shall be paid a reasonable fee on a hourly basis for necessary services rendered and they shall be strictly accountable for all money claimed or received for services rendered. Further, if attorneys' fees and/or expenses and costs are awarded in the RICO action in this case and/or for any other litigation claims, said lawyers shall reimburse Bankrupt Debtor for any moneys received so as to prevent said attorneys from receiving a double payment for expenses and/or services rendered. The Law Firms of Campbell and Levine and Mansmann, Cindrich and Titus shall not receive any legal fees for representing the Trustee in the above litigation until said litigation has been concluded. All fees heretofore billed to the Trustee Moody by Campbell and Levine for services rendered the Trustee Moody in regard to the "fraudulent conveyance" litigation shall be disgorged immediately and shall be returned by Campbell and Levine to the Debtor's estate.

FURTHER, every attorney and/or law firm of record in the United States Bankruptcy Case No. 82-3265, and in any of the above-captioned United States District Court case shall file a minute and fully itemized accounting statement of all moneys received and/or claimed from the Bankrupt Debtor's estate, and/or all money received from any client represented in all of these cases or related cases whether for services rendered and/or for money received for and/or in reimbursement for expenses or for services furnished by others for said Debtor but paid to said attorney by parties other than the Debtor.

FURTHER, the Trustee, James Moody, shall likewise file a minute and fully itemized statement for himself as Trustee and for his accounting firm of all moneys

received and/or claimed from the Bankrupt Debtor's estate, whether for services rendered and/or for money received for and/or in reimbursement for expenses or for services furnished by others but paid for by the Trustee and/or his accounting firm.

These accounts as above-mentioned for legal services, accounting services and reimbursement for expenses incurred, shall be filed within sixty (60) days of the date of this Order.

An Opinion of this District Court in support of these Findings of Fact, Conclusions of Law and the within Order shall be filed with the Clerk of this Court within fifteen (15) days of the date of this Order.

## OPINION

(March 29, 1988)

*Introduction*

*For four separate and distinct reasons, the underlying Bankruptcy case in this matter, No. 82-3265, should be converted from a Chapter 11, Reorganization Proceeding,*
[342] *to a Chapter 7, Liquidation Pro-* [342] *ceeding, pursuant to the Bankruptcy Code as amended.*

*Each of the reasons hereinafter set forth are separately sufficient cause to order the "conversion" of the within proceeding to Chapter 7.*

The Motion to Convert the underlying bankruptcy proceeding in the above-captioned case from Chapter 11 to Chapter 7, was filed by John Polojac and the American Flint Glass Workers Union of North America, Local No. 535 (hereinafter called "Union") in the United States Bankruptcy Court for the Western District of Pennsylvania, at Bankruptcy Case No. 82-3265, and

Bankruptcy Motion No. 87-531, and the motion was withdrawn to this District Court by order of this District Court dated March 10, 1987, (See Appendix Document No. 17, United States District Court, Civil Action No. 83-2383, at Docket Entry No. 385.) This Chapter 11 case was originally filed on October 4, 1982, as a Chapter 7 case and was converted to a Chapter 11 case by order of the Bankruptcy Court December 10, 1982. (See Bankruptcy Docket Entry numbers 1 and 23; Appendix Document No. 34) It is admitted that the Debtor's operations were completely shut down shortly after the conversion of the case to Chapter 11, and said glass business has not operated since. All of the Debtor's land, building, machinery, equipment, and all other assets that would be required to operate its former glass manufacturing business were sold in September of 1983. As of October 31, 1986, all of the Debtor's assets were converted to cash with the exception of a cause of action which the Trustee has filed against Security Pacific Business Credit, Inc., et al., in the United States District Court, Civil Action No. 83-2383, (the above-captioned case) alleging a "fraudulent conveyance". Since October 31, 1986, the only activity in this bankruptcy case has been the pursuit of that "fraudulent conveyance" cause of action. Since October 31, 1986, the Debtor has had no place of business, employees, payroll, telephone, work orders, future business, economic inventory, parts inventory, machinery or equipment, or any other tangible assets of any kind except cash. In order for the Debtor to get back into operations it would have to start from scratch in acquiring the necessary business facilities with which to operate a glass manufacturing business.

Title 11 U.S.C. Section 1112(b) of the Bankruptcy Code addresses this "Conversion Issue", now before this District Court. 11 U.S.C. §1112(b) of the United States

Bankruptcy Code outlines what elements a party in interest must establish in order to convert a Chapter 11 Reorganization into a Chapter 7 Liquidation. The portions of this Section relevant to Jeannette's bankruptcy reads as follows:

> "(b) Except as provided in subsection (c) of this section, on request of a party in interest or the United States Trustee, and after notice and hearing, the Court may convert a case under this Chapter to a case under Chapter 7 of this Title or may dismiss a case under this Chapter, whichever is in the best interest of the creditors and of the estate, for cause, including:
>
> (1) Continuing loss to or diminution of the estate *and* absence of a reasonable likelihood of rehabilitation;
>
> (2) Inability to effectuate a plan;
>
> (3) Unreasonable delay by the debtor that is prejudicial to the creditors;
>
> [(4) Additionally, the courts in their sound discretion have permitted a conversion from Chapter 11 to Chapter 7, for any "just cause". (See cases cited infra)]".

I.

*Because the undisputed Facts Demonstrate that there has been a Continuing and Severe Loss and Diminution of the Debtor's Jeannette Assets since its Bankruptcy Proceeding was Converted to Chapter 11 from Chapter 7 on December 10, 1982; and since it is Undisputed and in Fact Admitted by all Parties to this Proceeding that there is absolutely no Likelihood at all that said Debtor, Jeannette will*

*be rehabilitated into a "Going Concern"; the within*
[343] *Bankruptcy Proceeding must be* [343] *Converted from Chapter 11 to Chapter 7 of the Bankruptcy Code, as Amended.*

[1] The first grounds for conversion to be examined, considering the economic and physical condition of the Debtor, is §1112(b)(1) of the Bankruptcy Code which requires a showing of "continuing loss to or diminution of the estate and absence of a reasonable likelihood of rehabilitation." This section requires a showing that two separate and distinct factors exist in regard to the Chapter 11 Bankruptcy proceeding in question, before the court will convert it to Chapter 7 or dismiss it.

The first prong of §1112(b)(1), requires a showing of a continuing loss to the estate or a diminution of the estate. A showing of either will satisfy the first requirement of this section.

[2] A moving party can establish a diminution of an estate if a substantial loss of assets can be shown from the bankruptcy filing date until the hearing on the Motion to Convert. *In re: D & F Meat Corporation*, 68 B.R. 39 (Bkrtcy. S.D.N.Y. 1986)

A comparison of Jeannette's economic assets from the date of the bankruptcy filing until the hearing of January 29, 1988, on the Motion to Convert, displays a substantial diminution of the estate. When the petition was filed, Debtor possessed an entire glassmaking facility, including the equipment necessary for manufacturing. At that time, Debtor also had approximately 850 employees on its active payroll, plus various work orders and inventory on hand. Now, as previously stated, Debtor has none of these hard assets. These facts reveal a substantial diminution of the Debtor's estate.

The bankruptcy schedules filed by Jeannette Corporation at the beginning of the bankruptcy reflected that the total market value of Jeannette's assets as of the commencement of its bankruptcy case on October 4, 1982, was $8,132,518.00. (See Trustee's Disclosure Statement, Appendix Document No. 6, at page 9)

Between June 28, 1983, to October 31, 1986, all of the Debtor's assets were reduced to cash in the amount of $3,642,664.55, and in the same period there were administrative and litigation expenditures of $1,449,972.65, and other unlisted and listed expenditures for a cash balance ending October 31, 1986, of $2,192,691.90.

Except for interest on the Debtor estate's cash deposits, no business profits or business income of any kind have been generated by this bankrupt since June 28, 1983, to the present date and for a period of over four years. (See Appendix Document No. 9, Bankruptcy Docket Entry No. 446)

By April 8, 1987, the Debtor's assets had diminished by almost six million dollars. (See Bankruptcy Court Depository Order and Appendix Document No. 18)

Additionally, the Trustee estimates that there will be an additional allowable administrative expenses in the amount of $760,769.92. (See paragraph 18 of Appendix Document No. 23, United States District Court Case No. 83-2383, Docket Entry No. 399)

On page 19 of the Trustee's Disclosure Statement, (Appendix Document No. 6) under the heading, "5. Summary of the "Plan of Reorganization", we see the following:

"5. *Summary of the Plan of Reorganization*

The Plan of Reorganization proposes that the Court retain its jurisdiction over this estate and that the Trustee remain in control of the affairs of Jeannette Corporation, that he distribute the cash on hand as soon as practicable, and that he should seek to reduce any other remaining valuable property of the company, including its litigation, to money. He is to then make a final distribution, seek a final decree and close the bankruptcy estate as expeditiously as is comparable with the best interests of the holders of claims against the estate."

(See Trustee's Disclosure Statement, Appendix Document No. 6, at Page 19)

Likewise the Debtor's Plan for Reorganization is without doubt and admittedly a plan for liquidation of
[344] the assets of the [344] Debtor and is not a plan for rehabilitation of the debtor.

On page 26, of the Debtor's Disclosure Statement, we find the following statement:

"Because the Plan essentially provides for the liquidation of all the Debtor's assets and the distribution of the proceeds, it is quite similar to what would happen in a Chapter 7 liquidation."

(See Debtor's Disclosure Statement, Appendix Document No. 11, at page 26)

There is absolutely no chance at all for the Debtor to become rehabilitated into a "going concern" which fact is admitted by all interested parties.

A debtor must have a viable business in place in order to have any potential of rehabilitation, and where as in this case at bar, an ongoing lawsuit for an alleged

fraudulent conveyance is the only corporate activity of any kind, there is clearly no chance for corporate rehabilitation. In re: *Golden Ocala Partnership*, 50 B.R. 552 (Bankruptcy M.D.Fla.1985) Elaborating on this point, the *Golden* Court stated:

> "As noted, Golden conducted no business of any sort. It has no employees, it does not sell or buy anything or render any service to anyone. It has no assets of any kind except its claim, the validity of which is questionable, of a fraudulent transfer of the land once owned by Golden and now owned by the Reagin Group. The purpose of Chapter 11 reorganization is to assist financially distressed business enterprises by providing them with breathing space in which to return to a viable state. See, in re: *Dolton Lodge Trust No. 35188*, 22 B.R. 918 (Bkrtcy.N.D.Ill.1982) "If there is not a potentially viable business in place worthy of protection and rehabilitation, the Chapter 11 effort has lost its raison d'entre . . ." In Re, *Ironsides, Inc.* [34] B.R. 337 (Bkrtcy.W.D.Ky.1983)".

In Re: *Golden* at 552.

Debtors who argue that an "ongoing business" is not required under Chapter 11 meet with little success. *In the matter of Winshall Settlor's Trust*, 758 F.2d 1136 (6th Cir.1985) the Court in *Winshall* stated:

> "Although appellant contends that there is no explicit "ongoing business" requirement to Chapter 11 reorganization, such a requirement is inherent in the statute and clearly implied in 11 U.S.C. 1112(b)." *Id.* at 1137.

As above stated, Jeannette is not operating an ongoing business nor does it possess any assets to use in business or serve as collateral for refinancing. The

complete absence of economic activity is evidence that no reasonable likelihood of rehabilitation exists. Since Jeannette has no viable business, or potential viable business to protect or rehabilitate, their reason for remaining in Chapter 11 has evaporated.

In interpreting this section, courts have stressed that rehabilitation does not equal reorganization. In re: *The Ledges Apartments*, 58 B.R. 84 (Bkrtcy.D.Vt.1986) the *Ledges* Court stated:

> To satisfy 11 U.S.C. §112(b)(1), requires additional finding that there is no reasonable likelihood of rehabilitation. Rehabilitation does not equal reorganization. Reorganization encompasses rehabilitation and may contemplate liquidation. Rehabilitation on the other hand, may not include liquidation. As the term is used in §1112(b)(1), it means "to put back in good condition: re-establish on a firm, sound basis".
> *Id.* at 87.

Rehabilitation, under this section, has thus been defined to mean more than mere liquidation under a Chapter 11 proceeding, even though liquidation may constitute a permissible Plan of Reorganization under 11 U.S.C. §1123(b)(4). *In the matter of E. Paul Kovacs and Company, Inc.*, 16 B.R. 203 (Bkrtcy.D.Ct.1981). In re: *Tolco Properties, Inc.*, 6 B.R. 482 (Bkrtcy.E.D.Va. 1980).

It is impossible to rationally comprehend Jeannette being rehabilitated and put back in a good sound operable position and reestablished on a firm basis. It definitely would be more efficient to build an entirely new glassmaking facility with brand new capital than to
[345] try and rebuild one with [345] what remains of this debtor. Jeannette has no reasonable likelihood of

rehabilitation (as defined by case law interpreting this section) and thus does not qualify to remain in Chapter 11.

[3] Jeannette's Trustee may claim that although they do not own a viable ongoing business, they do possess a fraudulent conveyance action which, in their opinion, may provide at some point in the future significant assets to the estate which can then be distributed to the creditors under 11 U.S.C. Section 1101. This scenario (no asset debtor excepting for a questionable cause of action) is not uncommon to the bankruptcy courts. As just noted in the *Golden* case, the debtor had no assets of any kind excepting a cause of action regarding a land transfer. The Court held that this Debtor had no reason being in Chapter 11 regardless of the potential cause of action, for there was no viable business worthy of protection and rehabilitation. *Golden,* supra, at 557.

In general, courts look to what capital and other actual assets a debtor possess which can be used in his Plan of Reorganization, however, potential recovery from a law suit is insufficient to create a reasonable likelihood of rehabilitation. *In the matter of Imperial Heights Apts., Ltd.* 18 B.R. 858 (Bkrtcy.S.D.Ohio, 1982). Since there is no way to establish the feasibility of a plan which is to be funded solely from the possibility of a law suit, bankruptcy courts will convert or dismiss such Chapter 11 bankruptcy cases. *In the matter of Winshall Settlor's Trust,* 758 F.2d 1136 (6th Cir.1985). Some Courts have stated that a mere potential law suit is insufficient to even invoke Chapter 11 jurisdiction if the debtor has no "business" to reorganize. *In re: 312 West 91st Street Company,* 35 B.R. 346 (Bkrtcy.S.D.N.Y.1983). The *312 West Court* held:

> . . . the debtor has no income, no premises, and never opened its doors to the public. The debtor's only "business" consists of abusing the bankruptcy process by attempting to use this court as a forum for pursuing its tenuous state law claim for wrongful eviction.

*Id.* at 348.

Jeannette is similar to the above cases in that it has no ongoing business, tangible assets, or potential for rehabilitation. As noted, Chapter 11 Plans cannot be funded on potential recovery from future law suits. This is particularly so in this case where some of the former principals of the debtor are defendants in the fraudulent conveyance action brought by the Trustee. It is ridiculous to contemplate that after the litigation is completed by judgment or settlement that the principals will then organize the Debtor into an operating entity. The conclusion of this Chapter 11 case will be a liquidation. There is just no other possibility and bankruptcy courts have consistently held that this type of Debtor should not be in a Chapter 11 Bankruptcy.

Inasmuch as both prongs of 11 U.S.C. §1112(b)(1), have been met, it is clear that this Debtor's estate may properly be converted from Chapter 11 to Chapter 7.

II.

> *Because the undisputed facts show beyond any doubt that the Reorganization Plan formulated by the Trustee and approved by the Bankruptcy Judge is unfeasible and can never be effectuated under any foreseeable circumstances because of the present inability of the Trustee to identify the Unsecured Creditors who are eligible to vote on the "Plan" and*

*because of the present inability of the Trustee to assign a dollar value to the great majority of the claims in order to properly "weigh and/or apportion" the dollar value of each claimant, the within Bankruptcy proceeding must be converted from Chapter 11 to Chapter 7 of the Bankruptcy Code, as amended.*

[4] Although the Debtor qualifies for conversion to Chapter 7 under 11 U.S.C. §1112(b)(1), a second ground for conversion will be explored under §1112(b)(2), which requires a showing that the Debtor lacks the ability to formulate or carry out a plan. Case law reveals that the
346] inability to effectuate a plan and the absence of a [346] reasonable likelihood of rehabilitation [the second requirement of §1112(b)(1) are closely related.

Bankruptcy Courts will use this section to convert or dismiss a Chapter 11 Debtor where it is shown that the Debtor is little more than a corporate shell lacking a place of business, employees, payroll, or discernible economic activity. *In re Larmar Estates, Inc.*, 6 B.R. 933 (Bkrtcy.E.D.N.Y. 1980); *In re Economy Cab and Tool Company, Inc.*, 44 B.R. 721 (Bkrtcy.D.Minn. 1984).

Courts are not required to give a detailed analysis of why they may consider a Plan to be unfeasible. *Fossum v. Federal Land Bank*, 764 F.2d 520, (8th Cir.1985). In *Fossum*, the Debtors filed a Plan of Reorganization and their creditor subsequently objected to the Plan on the basis that it was unfeasible. These creditors also sought a dismissal of the case under §1112(b)(2). The Bankruptcy Court denied the confirmation of the Plan, finding it was unfeasible and also dismissed the case stating that, "there was a point at which the Debtor must realize that reorganization is simply not possible and that liquidation is the only feasible alternative."

*Fossum, Id.* at 520. The debtors appealed this decision on the grounds that the Bankruptcy Court failed to make adequate findings of fact. This appeal was to no avail.

Perhaps the most detailed analysis of this section is found in *Clarkson v. Cooke Sales and Service Company,* 767 F.2d 417 (8th Cir.1985). This Court reasoned that if the Debtor could not submit a feasible Plan then they did not have the ability to effectuate a Plan. The *Clarkson Court* held:

> "Although we sympathize with the Clarksons, we find that the feasibility test is firmly rooted and predictions based on objective fact. The Second Circuit has declared that the feasibility test contemplates "the probability of actual performance of the provisions of the plan. Sincerity, honesty and willingness are not sufficient to make the plan feasible, and neither are any visionary promises. The test is whether the things which are to be done after confirmation can be done as a practical matter under the facts." (*In re Bergman,* 585 F.2d 1171 (2d Cir.1978). Pertinent factors to be considered include the businesses earning power, the sufficiency of the capitol structure, economic conditions, managerial efficiency, and whether the same management will continue to operate the company".

*Clarkson* at 420.

It is difficult to imagine how Jeannette is going to submit or effectuate a viable Plan of Reorganization. The Debtor has no "business" to reorganize and is nothing more than a mere "corporate shell". Courts consistently hold that such facts constitute an inability to effectuate a plan. Conversion or dismissal is proper under this section.

It is further the opinion of this Court that the Debtor's attitude in asserting the "bar date" as against the claims of the Active Employees and the Retirees will make it impossible as a practical matter for any Plan of Reorganization to be confirmed. Under Bankruptcy Code §1111(a), all scheduled claims are deemed filed and are "therefore allowed under Bankruptcy Code §502". All allowed unsecured claims have the right to vote on a plan of Reorganization pursuant to Bankruptcy Code §1126(a). Also under Bankruptcy Code §1126(c) in order for a Plan of Reorganization to be accepted by a class of creditors at least two-thirds in dollar amount and more than one-half in number of the allowed claims in that class must vote to accept the Plan.

There are approximately 2027 unsecured non-priority claims in this case consisting of 882 trade creditors and 903 Active and 242 Retired Employees. In order for the Debtor to obtain confirmation of any plan, more than fifty (50%) percent in number of claimants and more than two-thirds in dollar amount must vote in favor of the Plan.

Of this 2027 Unsecured Creditors, all 1145 of the active and inactive employees have failed to file their complete claims prior to the "Claims bar date", October 31, 1983. The Debtor did schedule 732 active employee
[347] claims for vacation pay only. [347] However, the claims of 151 active employees, 242 retired employees and 95 unsecured trade creditors were not scheduled or filed prior to October 31, 1983, the "claims bar date". It is noted that all of the employees (active and retirees) have not as yet established the exact amount of their claim. Further, it is an open question as to the legal effect of the "claims bar date" as to the 1145 employee claims.

Additionally, litigation as to whether and/or when the Collective Bargaining Contract was rejected by the Trustee will have to be concluded in order to assess the dollar amount of the employee's vote.

Moreover, contrary to the Trustee's assertions, equity does not compel the blanket extension of the "claims bar date" for all late claims in this case under Rule 3003(c)(3).[1]

Although it is well established that a violation of a creditor's due process rights may be "cause" for extension of the bar date under Rule 3003(c)(3), courts have held that the amount of notice which is necessary [to comport with due process] is dependent upon the facts and circumstances of each particular case. *Sheftelman v. Standard Metals Corporation*, 839 F.2d 1383 (10th Cir.1987) (per curiam) [citing *Mullane v. Central Hanover Trust Co.*, 339 U.S. 306, 70 S.Ct. 652, 94 L.Ed. 865 (1950)]. Here, the late claimants fall into at least three different categories.

1. Many of the late claimants, notably the active Union employees, *received written notice* of the "bar date". It is clear that no cause exists for extension as to their claims under Rule 3003(c)(3). *In re Siouxland Beef Processing Company*, 55 B.R. 95, 100 (Bankry.N.D.Iowa

[1] The fact that many of the late claims arise from the Debtor's rejection of executory contracts does not alter this result. Despite the Trustee's assertions to the contrary, Rule 3002(c)(4) does not apply to Chapter 11 proceedings. *Liakas v. Creditors' Committee of Deja Vu, Inc.*, 780 F.2d 176, 179 (1st Cir.1986). Moreover, even assuming *arguendo*, that it did apply, the language of Rule 3002(c)(4) is permissive, not mandatory. *Id.* Further, see page 19 of Slip Opinion, *Remington Rand Corp. etc. v. The Kilbarr Corp. etc.*, 836 F.2d 825 (3rd Cir.1988). Evidentiary facts necessary to support the filing of a late claim in a bankruptcy matter must be developed on a case by case basis to determine the legal justification for filing a late claim. To be reported at 836 F.2d 825 (3rd Cir.1988.)

1985) ["Rule 3003(c) . . . mandates that any creditor whose claim is unscheduled shall file a proof of claim within the time fixed by the court."]

2. Many other late claimants who did not receive written notice of the "bar date" plainly had actual notice of Jeannette's bankruptcy from the widespread publicity it received. This notice may be evidenced, in part, by their attendance at hearings and their active involvement in these proceedings. A determination as to whether sufficient "cause" exists for extension of the "bar date" under Rule 3003(c)(3) as to a particular claimant in this category may depend on (i) whether the Debtor knowingly failed to list the claimant (See *In re Siouxland Beef, Id.*), or (ii) whether the claimant waited too long after learning of the Debtor's bankruptcy before asserting his claim against the estate (see *In re: Cmehil*, 43 B.R. 404 (Bankry.N.D.Ohio 1984)

3. Finally, there are undoubtedly other late claimants as to whom, for a variety of reasons, equity may require or may not require the extension of the "bar date". This category would include, for example, people who received no notice—written or actual—of the existence of the bankruptcy proceeding and people who were incapacitated and thus unable to file a claim on time.

Before it is known who has the right to vote on either of the Trustee and/or Debtor Plan's of Reorganization and the dollar amount of each claim, there will have to be at least over 1200 separate "estimation hearings" on the issue of late employee claims which will take years to litigate.

Additionally, the Debtor's Disclosure Statement indicates that the Debtor will seek the complete disallowance of the Pension Benefit Guaranty

Corporation Claim. (See page 105 of hearing transcript,
[348] Docket Entry No. 387, United States District [348] Court, Civil Action No. 83-2383). The Trustee's Disclosure Statement, (Appendix Document No. 6, page 22) as to the Pension Benefit Guaranty Corporation (PBGC) speaks of a tentative agreement with counsel for the "PBGC", wherein PBGC would release its priority status and would settle with the Debtor's estate for an estimated $1,387,528.00 (See also paragraphs 11, 12 and 13, Docket Entry No. 399, Appendix Document No. 23) In the usual case an "estimation hearing" would be necessary to determine the "weight" of PBGC's vote on a Plan of Reorganization which has the potential of being in the amount of $7,658,780.00. In this PBGC claim situation it is impossible for a Court to estimate the value of such a claim for voting purposes on a Plan of Reorganization because the allowable amount of the largest PBGC claim No. 429 is dependent upon a judicial determination of the merits and value of the District Court "fraudulent conveyance" litigation since by a Federal Statute (ERISA) the claim is limited to an amount not to exceed thirty (30%) percent of the Debtor's "net worth" as of March of 1983, when Debtor's pension plan was terminated. (There also is a contention as to the exact time of termination of the pension plan) ERISA provides that the Debtor's "net worth" is to be increased by the value of the District Court "fraudulent conveyance" litigation. This District Judge believes that it is presently impossible for a Judge to fairly estimate the value of said litigation. PBGC is presenting the No. 429 claim as being one entitled to priority for $6,800,000.00.

Contrary to the Trustee's Plan of Reorganization and Disclosure Statement, (Appendix Document No. 6, page 22) it is apparent that the PBGC claim cannot be

compromised, and consequently, the Trustee moved to withdraw the reference of this matter from the Bankruptcy Court to the United States District Court. (See the above-captioned Civil Action No. 87-2384, which is related to the "fraudulent conveyance" litigation, Civil Action No. 83-2383)

Further, if it is held that the PBGC is entitled to priority, it would be scheduled in a "separate class" and as a result the entire Plan of Reorganization would be "held hostage" to the PBGC vote, which as we have already noted said vote is impossible to ascertain within the foreseeable future. In any event, no vote on a Reorganization Plan can be cast by PBGC until the "dollar weight" of PBGC's vote as to the Reorganization Plan can be determined, which vote is completely impossible within a reasonable time.

In addition to the many contested claims and the contested PBGC claims, we have a multitude of other outstanding disputed claims that need an "estimation" resolution. *See* Exhibits "A" through "F" of Appendix Document No. 23 Civil Action No. 83-2383, Docket Entry No. 399.

Another vexing legal problem as to the estimated value that can be given to an outstanding contested claim arises by virtue of a claim for indemnification that the Defendant, Security Pacific has with respect to any loss that it might suffer in the above-captioned "fraudulent conveyance" litigation and just as in the PBGC claim, Security Pacific wouldn't know what its claims in fact were until the "fraudulent conveyance" litigation is ended. Again, an "estimation hearing" would be necessary to ascertain the voting weight of said claim, if any. A fair "estimate" is impossible.

Other outstanding contested claims that will warrant much court attention in order to estimate the weight of the claimant's voting rights are the "insider claims" of Mr. Brogan, Mr. Janowiak and others. (See page 111 of hearing transcript, Docket Entry No. 387, Civil Action No. 83-2383.)

Also, there are a group of commission salesmen who have outstanding contested claims that need estimating; (See page 118 of hearing transcript, Docket Entry No. 387, Civil Action No. 83-2383); Profit Sharing Claims to be estimated; (See page 119 of hearing transcript, Docket Entry No. 387, Civil Action No. 83-2383); Royalty Technology Claims to be estimated; (See page 121 of hearing transcript, Docket Entry No. 387, Civil Action No. 83-2383); McCracken General Employee Claim for
[349] $29,470,463.00, has to have a value estimation hear- [349]
ing. (See pages 121 to 134, inclusive of the hearing transcript, Docket Entry No. 387, Civil Action No. 83-2383)

Also there are 95 outstanding contested claims of unsecured trade creditors who filed after the "claims bar date" whose claims must receive a "value estimation hearing".

As has been mentioned even if both the Trustee and the Debtor would receive permission of this Court to file a Plan of Reorganization with over two thousand of the eligible unsecured claimants and/or creditors of the Debtor's estate, the identity and dollar amount claimed by each claimant must be first estimated before a vote may be had on the proposed Reorganization Plan.

There are over 1400 contested claims raising issues as to the identity of the claimant, (late filing claimants) the

amount of the claim and/or both that require "claim estimation" hearing. Section 502(c) of the Bankruptcy Code provides:

> "There shall be estimated for purposes of allowance under this section—(1) any contingent or unliquidated claim, fixing of liquidation of which, as the case may be, would unduly delay the closing of the case. . . .".

The United States Court of Appeals for the Third Circuit in the case of *Bittner v. Borne Chemical Co., Inc.*, (691 F.2d 134, 135 (1982)) set forth the procedure for estimating contested claims as follows:

> "The Code, The Rules of Bankruptcy Procedure, 11 U.S.C.App. (1977) and the Suggested Interim Bankruptcy Rules 11 U.S.C.A. (1982) are silent as to the manner in which contingent or unliquidated claims are to be estimated. Despite the lack of express direction on the matter, we are persuaded that Congress intended the procedure to be undertaken initially by the bankruptcy judges, using whatever method is best suited to the particular contingencies at issue. The principal consideration must be an accommodation to the underlying purposes of the Code. It is conceivable that in rare and unusual cases arbitration or even a jury trial on all or some of the issues may be necessary to obtain reasonably accurate evaluation of the claims. (See 3 *Collier on Bankruptcy* ¶502.03 (15th ed. 1981) Such methods, however, usually will run counter to the efficient administration of the bankrupt's estate and where there is sufficient evidence on which to base a reasonable estimate of the claim, the bankruptcy judge should determine the value. In doing so, the court is bound by the legal rules which may govern

> the ultimate value of the claim. For example, when the claim is based on an alleged breach of contract, the court must estimate its worth in accordance with accepted contract law. See, e.g., 3 *Collier on Bankruptcy* ¶57.15[3.2] (14th ed. 1977) However, there are no other limitations on the court's authority to evaluate the claim save those general principles which should inform all decisions made pursuant to the Code."

Assuming a six hour court day and conservatively four hours to each of over 1400 claim estimation hearings. (Taking evidence, hearing the opposed arguments, and making a decision will take in fact, twice four hours or eight hours) It will take one Bankruptcy Judge over 3½ years to complete all of the estimation hearings alone and render a decision as to who is entitled to vote and the "dollar weight" that will be given to each claimant's vote.

Contrary to the specious arguments of the plaintiff's counsel in the "fraudulent conveyance" litigation it is clear that all of the interested parties in this case have been placed in a procedural box, for once an offer of settlement of the "fraudulent conveyance" litigation was made and referred to in both the Trustee's and Debtor's proposed Plans of Reorganization, the qualified voters (the "unsecured creditors" of the various "impaired classes") are entitled prior to any trial on the merits to vote on whether they will reject or accept the plan and/or plans which are submitted to them for their approval or rejection, but the procedural catch is that no one knows the identity of the voters and the "dollar weight" of their vote.

[350] [350] The Trustee Moody, presumably with the advice of their attorneys Campbell and Cindrich unlawfully have taken upon themselves the unilateral power to reject the offer of settlement in the "fraudulent conveyance" litigation in the amount of one and one quarter million dollars without the consent of the Unsecured Creditors, and where said attorneys admittedly have a vested financial interest in the litigation. The trustee must give the real parties in interest and/or Unsecured Creditors (whose identity and/or dollar amount in over 1400 cases is now unknown), the opportunity to vote as to whether they will accept the offer of settlement. The offer of settlement[1] was an ongoing binding offer that should have been submitted to the Unsecured Creditors for their consideration and it was clearly erroneous for the Bankruptcy Judge to have approved the submission of the Trustee's Plan of Reorganization and Disclosure Statement to the Unsecured Creditors for approval, without giving the unsecured creditors an opportunity to accept the offer of settlement. *See* Disciplinary Rule of the Pennsylvania Code of Professional Responsibility which currently has been adopted by the United States District Court as follows:

A. DR 5-106. Settling Similar Claims of Clients

(A) *A lawyer who represents two or more clients shall not make or participate in the making of an aggregate settlement of the claims of or against his clients, unless each client has consented to the settlement after being advised of the existence and nature of all the claims involved in the proposed settlement, of the total amount of the settlement, and of the participation of each person in settlement.*

(See Page 129 of Appendix Document No. 33)

[1] (See Appendix Document No. 17)

B. EC 7-7 Duty of a Lawyer to a Client

> In certain areas of legal representation not affecting the merits of the cause or substantially prejudicing the rights of a client, a lawyer is entitled to make decisions on his own. But otherwise the authority to make decisions is exclusively that of the client and, if made within the framework of the law, such decisions are binding on his lawyer. As typical examples in civil cases, it is for the client to decide whether he will accept a settlement offer.

(See Pages 130 and 131 of Appendix Document No. 33)

(See Trustee's proposed plan and amendment thereto.) (See Appendix Documents Nos. 5, 6 at Page 18 and 7) (See Debtor's proposed Plan and Disclosure Statement Appendix Document Nos. 10 and 11)

The "fraudulent conveyance" case under the circumstances, cannot be tried under any circumstances unless and until the real parties in interest, i.e., the duly qualified unsecured creditor voters are fully informed as to the risks of success or failure involved in prosecuting the litigation and are given a chance to either approve or disapprove of a proposed settlement as the same are suggested and explained in the proposed and/or amended rival "Plans of Reorganization" of the Debtor. But as before noted, there can be no voting on the "plans" because the names of the "voters" and the "dollar weight" of their votes cannot be properly identified at this time. The three or four years of delay which would be necessitated by the need of the Bankruptcy Court to estimate the true identity of the 1400 claimants and/or the value of over 1400 claims on a case by case basis clearly reveals that as a practical matter the Trustee and/or the Debtor lack the present ability to effectuate a

Plan of Reorganization (liquidation in fact) within a reasonable time, so clearly for this reason this bankruptcy case should be converted from Chapter 11 to Chapter 7 for ultimate liquidation.

III.

*Because the undisputed facts indicate beyond any doubt that the final completion of this "fraudulent*
[351] *convey-* [351] *ance" litigation will be delayed for years since there can be no vote on a Plan of Reorganization addressing the issue of accepting or rejecting the offer to settle said litigation until the Trustee is able to identify the Creditors who are eligible to vote on the Plan and until the Trustee is able to assign a dollar value to said creditor's claims, and hence there will be an inordinate delay in bringing this bankruptcy proceeding under Chapter 11 to an end; and further, since it is admitted by all parties that this Debtor's assets must be liquidated in any event, it is clear that this Bankruptcy Proceeding must be converted from Chapter 11 to Chapter 7 of the Bankruptcy Code as amended and to permit this case to be processed as a class action in order to ultimately bring this matter to an end within a reasonable time.*

[5] The final of the enumerated causes to be examined that is applicable to Jeannette's situation is §1112(b)(3) which states that a case may be converted or dismissed if the moving party shows an unreasonable delay by the Debtor that is prejudicial to creditors. The requirements of this "cause" are often interrelated with the requirements of §1112(b)(1) and (2) and courts often use all three of these sections, in converting or dismissing a Chapter 11 case. [NOTE: Because all four of these

reasons for converting this Bankruptcy case to Chapter 7 are related and are based on the same factual history there is much repetition in this opinion.]

Courts will often combine §1112(b)(2) and (3) and hold that the Debtor made an unreasonable delay that is prejudicial to the creditors because the Debtor did not or cannot effectuate a plan within a certain time period. *In re Koerner v. Colonial Bank,* 800 F.2d 1358, (5th Cir. 1986). *In re Galvin,* 49 B.R. 665 (Bkrtcy.D.N.D.1985). In *Galvin,* the Debtor filed for relief under Chapter 11 on August 31, 1983, and filed a Plan on October 10, 1984. This Plan was not confirmed due to valid objections by certain creditors and the court advised Debtor's counsel to continue their efforts towards achieving a confirmable Plan. The hearing was continued until January 16, 1985. The Plan, with no modifications or changes, again came on for consideration and confirmation was thus again rescheduled. After adequate protection payments were not made, creditors filed a motion to convert or dismiss. The *Galvin* Court held:

> "Despite the passage of one year under the protective umbrella of Chapter 11, the debtors had been unable to operate on even a marginally profitable basis as demonstrated by the financial reports.... It is not the purpose of Chapter 11 to allow a debtor a permanent cloak of protection while the estate assets continue to diminish and the operational coherency unravels. The function of Chapter 11 is rehabilitation—not disintigration.... The case has been unreasonably delayed without any prospect of rehabilitation in the offering."
>
> *Galvin* at 669.

After examining the totality of the circumstances, the *Galvin* Court held that the inability of the Debtor to effectuate a confirmable Plan constitutes an unreasonable delay by the Debtor and thus ordered the case dismissed.

In *Koerner,* supra the court converted a reorganization proceeding to a straight bankruptcy because of the Debtor's inability to effectuate a Plan and the Debtor's unreasonable delay which was prejudicial to its creditors. The court specifically noted that it had given the Debtor every opportunity to submit a feasible Plan over a 16 month period. Instead, Koerner submitted what the bankruptcy Judge described as a nebulous Plan based on projected legal fees that was neither adequate, feasible nor practicable and would not result in a reorganization. *Koerner,* supra, at 1368.

The purpose of section 1112(b), is outlined in *Hansen v. Tiana Queen Motel, Inc.,* 749 F.2d 146 (2d Cir. 1984). This Court held that "the purpose of §1112(b) is not to test the Debtor's good faith; it is to provide relief where the Debtor's efforts, however heroic, have proven inade-
[352] [352] quate to the task of reorganizing his affairs effectively within a reasonable amount of time." *Hansen, Id.* at 152. Here the court specifically refrained from fixing a certain amount of time to be allowed a Debtor in order to effect a Plan of Reorganization. However, they felt that in this particular matter, where 15 months have elapsed from the filing of the Chapter 11 petitions, too much time had elapsed and it was within their discretion to convert the case to Chapter Seven.

In the case at hand, on October 4, 1982, an involuntary petition under Chapter 7 was filed by certain creditors of Jeannette. On its own motion, Jeannette converted the case to a Chapter 11 on December 23, 1982. Since this

time, (almost five years) six Plans of Reorganization have been submitted and no confirmable Plan of Reorganization has been submitted to the Bankruptcy Court. It is clear that no possibility of rehabilitation or reorganization exists for Jeannette. A delay of approximately five years from Chapter 11 filing with no potential affirmable Plan in sight constitutes an unreasonable delay by Jeannette and/or the Trustee which is prejudicial to the creditors.

Because of the need to utilize formal bankruptcy court proceedings on a case by case basis to establish the identity and estimate the value of over 1400 Unsecured Creditor claims in order for there to be a vote on whether the Reorganization Plan and/or Plans will be approved or disapproved, [(which will take three or four years to accomplish even before the "fraudulent conveyance" law suit can be brought to trial, since the Unsecured Creditors (whose identity and dollar weight of their vote is unknown) must be given the opportunity to accept or reject the offer of settlement before the "fraudulent conveyance" case can be tried,)] it is undoubted that the Unsecured Creditors certainly will be unjustifiably delayed and prejudiced unlawfully to their economic detriment if the case is not converted immediately to Chapter 7 of the Bankruptcy Code.

IV.

*Because the undisputed facts demonstrate that the Trustee and the attorneys for the Trustee have maintained this Chapter 11 proceeding for personal financial gain contrary to the Pennsylvania Code of Professional Responsibility, and because said Trustee attorneys are now pressing this District Court to extend the "claims bar date" in lieu of conversion to Chapter 7 of the Bankruptcy Code in*

*order to protect their admitted vested financial interest in the "fraudulent conveyance" litigation, (which attorneys' vested interest is in a direct and obvious conflict with the financial interests of their original clients, the 882 Unsecured Trade Creditors,) and because there is admittedly no present intention of any kind by anybody to reorganize this debtor, it is the firm conclusion of this District Court that this Chapter 11 proceeding is being maintained for bad faith unethical reasons and the said bankruptcy proceeding must be converted to Chapter 7 of the Bankruptcy Code as amended for just cause.*

[6] It is important to note that Bankruptcy Courts and/or District Courts are not confined to pigeon holing their particular set of circumstances into one of the defined "causes" listed in subsection (b) of §1112 whenever they desire to convert or dismiss a case filed under Chapter 11. A careful reading of the final phrase of subsection (b) reveals that "cause" includes, but is not necessarily limited to, the thereafter enumerated circumstances. Congress had made it clear that the list of what constitutes cause under §1112(b) is not exclusive. The House of Representatives discussion of this section states:

> "Subsection (b) gives wide discretion to the court to make an appropriate disposition of the case when a party in interest requests. The court is permitted to convert a reorganization case to a liquidation case or to dismiss the case, whichever is in the best interest of the creditors and the estate, only for cause . . .
> [353] The list of [nine conditions] is not ex- [353] haustive. The court will be able to consider other factors as they arise, and use its equitable powers to reach an appropriate result in individual cases. H.R.Rep. Cong. and Admin.News 1987, Page 5781, 6361, 6362."

Recent bankruptcy opinions have indicated a willingness on the part of the Courts to use their judicial discretion and equitable powers in expanding the definition of exactly what constitutes "cause" for which a Chapter 11 bankruptcy may be converted or dismissed. Lack of good faith to prosecute a case, and lack of intent to reorganize are additional causes for which a Chapter 11 bankruptcy may be converted or dismissed. These additional "causes" will be examined in the light of the facts of this Jeannette bankruptcy.

A general area of judge made law which may be used to convert or dismiss a Chapter 11 case is "lack of good faith" by the Debtor and/or Trustees in filing and maintaining a Chapter 11 bankruptcy. Although bad faith is not a specific ground for dismissal or conversion under §1112(b), the legislative history of this section leaves no doubt that the Court may consider whatever factors it deems relevant in deciding the case. *In the Matter of Mogul*, 17 B.R. 680 (Bkrtcy.M.D.Fla.1982). Elaborating on this point, the *Mogul* Court held:

> "There is nothing in the legislative history which would indicate that Congress, by omitting the express requirement of "good faith" intended to do away with the safeguard against abuse and misuse of the process, a safeguard which has long been established and accepted as part of the bankruptcy philosophy for almost a century. Accordingly, good faith must be viewed as an implied prerequisite for the debtor's ability or obtaining relief under this Chapter [11]."
>
> *Mogul* at 682.

Other courts have held that good faith requires an intent to reorganize accompanied by a reasonable possibility of success. *In the matter of W.J. Rewoldt*

*Company,* 22 B.R. 459 (Bkrtcy.E.D.Mich.1982). The Court in Rewoldt stated that the special remedy intended for reorganization in Chapter 11 is misused when a Debtor files such a reorganization seeking only an "overly luxurious administrative vehicle" to achieve a liquidation more expeditiously accomplished in Chapter 7. *In re Rewoldt* at 462. In *Jeannette,* the Debtor has no reasonable likelihood of reorganization and is actually and purposely in the process of liquidation. For both Trustee and the Debtor to insist upon remaining in Chapter 11 under the present circumstances represents a lack of good faith on the part of both the Trustee and Jeannette.

This entire bankruptcy case was started in bad faith. As noted earlier in the factual history of this case, the "Involuntary Petition in Bankruptcy" was filed by Attorney Campbell (who is still greatly involved in this case and admits to having a personal "vested monetary interest" in the "fraudulent conveyance" litigation,) with the support of only one unsecured creditor. This "Petition" was legally void on its face and should have been dismissed immediately as "out of hand". Instead, with the concurrence of Attorney Campbell, the Debtor's attorneys and the Bankruptcy Court a "Void Chapter Seven Proceeding" was amended after the fact and was converted into a so-called viable Chapter Eleven Reorganization.

Very soon after the conversion to Chapter Eleven on December 10, 1982, Attorney Campbell without officially abandoning his initial client in this case, the George Hill Company, he, Campbell, became attorney for a group of nine unsecured trade creditors.

Since the filing of Attorney Campbell's spurious Petition for Involuntary Bankruptcy in this case, all of the Debtor's estate has been reduced to cash, (except for

the above-captioned on-going "fraudulent conveyance" law suit) in the total cash amount of $3,642,664.55. (See Appendix Document 9)

As noted in the factual history of the case, out of the over 3½ million in total cash taken in by the Debtor, over one million dollars has been paid out and/or claimed
[354] for attorney and accounting fees [354] and over ⅓ of one million dollars has been paid to and or claimed by Mr. Campbell's Firm, Campbell & Levine. In addition, as noted in the historical facts, Mr. Campbell claims a "vested interest" in the alleged one-third contingent fee arrangement concerning the above-captioned and on-going "fraudulent conveyance" litigation and which contingent fee could theoretically amount to approximately 12 million dollars.

At the time of the "Contingent Fee Order" by Judge Gibson, on July 28, 1983, there was a cash balance of $1,615,492.42, in the bankrupt debtor's account and by April 8, 1987, (See Bankruptcy Docket Entry No. 533) there was $2,210,000.00 in cash in the bank. The cash balance on the 31st of October, 1986, was $2,192,691.90. (See Bankruptcy Docket Entry No. 446). Clearly, there was no need for a contingent fee agreement in this case. (See Appendix Document Numbers 24, 25 and 36.)

The order of July 27, 1983, also appointed James Moody as Trustee for the Debtor and directed the said James Moody to join in the litigation now before this Court which was later filed on September 22, 1983. (See paragraph 12 of the Order, Bankruptcy Docket Entry No. 165)

Additionally, and above-noted, the Order of July 27, 1983, required the Debtor to withdraw all pending Plans of Reorganization. (See paragraph One of the Order of Bankruptcy Docket Entry No. 165)

(NOTE: There were three Bankruptcy Court Orders relating to initiating or beginning the "fraudulent conveyance" litigation now before this Court.)

The First Order (Appendix Document No. 2) was dated July 27, 1983, withdrawing the pending Plan of Reorganization. (Third Amended Proposed Plan and Fourth Plan to be filed) approving the sale of certain assets, appointing James Moody, Trustee and granting the Trustee and Committee of Unsecured Creditors Standing to Sue and approving their application to engage Co-counsel to sue certain parties in the United States District Court for allegedly being involved in fraudulent conveyance of the Debtor's (Jeannette Corp.) property.

The Second Order (Appendix Document No. 3) was dated July 28, 1983, the next day after the First Order (See Appendix Document 2) was signed by the Bankruptcy Court, and permitted the Committee of Unsecured Creditors to engage the Law Firms of Campbell & Levine, and Mansmann, Cindrich and Huber, as its legal counsel to pursue the fraudulent conveyance litigation with a 33% contingent fee arrangement.

The Third Order (Appendix Document No. 4) also was dated on July 28, 1983, the next day after the First Order (See Appendix Document No. 2) was signed by the Bankruptcy Court and granting the Committee of Unsecured Creditors Standing to Sue on behalf of the Debtor, (Jeannette Corp.) to recover damages arising out of alleged fraudulent conveyance of Debtor's property.

The Debtor's Counsel, Sanford M. Lampl, consented to the First Order of July 27, 1983, and Douglas Campbell, attorney for the Committee of Unsecured Creditors, also

consented to the same, and according to the "First Order" (Appendix Document No. 2, there was a hearing prior to the entry of the First Order. However, as to both the "Second Order" (Appendix Document No. 3) and the "Third Order" (Appendix Document No. 4) there was no prior notice, no hearing, no consent signed by either Debtor's attorney, Trustee's attorney and/or the attorney for the Committee of Unsecured Creditors, and in fact, to this day, neither the "Second Order" (Bankruptcy Docket Entry No. 100, Appendix Document No. 3) or the "Third Order" have been time-stamped by the Clerk of the Bankruptcy Court; nor were these "Second" and "Third" Orders mailed to interested parties.)

Again, we have Attorney Campbell seeking and obtaining the signature of the Bankruptcy Judge on two spurious Court Orders in the Bankruptcy Court in this case.

As noted above, a Trustee, James Moody had been appointed and he was authorized to begin this "fraudulent conveyance" case (Appendix Document No.
[355] 2) as of July 27, [355] 1983. The companion portion of the Order of July 27, 1983, (Appendix Document No. 2) and the two Orders of July 28, 1983, (Appendix Documents Nos. 3 and 4) purporting to grant the application of the Committee of Unsecured Creditors to engage Co-counsel on 33% contingency basis with Standing to Sue as a co-plaintiff in the "fraudulent conveyance" case were all void *ab initio* and all three of these Orders are and were of no legal force or effect, since the Trustee alone at that time was the only party with proper standing to bring suit to void the alleged "fraudulent conveyances".

The Bankruptcy Judge who signed these Orders of July 27, 1983, and July 28, 1983, knew full well that a Creditor's Committee is allowed to initiate legal proceedings *only* when the Trustee or Debtor in possession unjustifiably fails to bring a necessary law suit and/or has abused its discretion in not suing to avoid a preferential transfer. In fact, this very Bankruptcy Judge who signed these three Orders as above-noted, had so ruled in the case of *In re Monsour Medical Center*, 5 B.R. 715, 718 (Bankry. W.D.Pa.1980). In fact, the Monsour case was cited with approval on the same point of law, (*In re STN Enterprises* 779 F.2d 901, 904 (2nd Cir.1985) when the Court of Appeals held unequivocally that the creditor Committees are allowed to initiate legal proceedings *only* when the Trustee or Debtor in possession unjustifiably fails to bring suit or abused its discretion in not suing to avoid a preferential transfer. Sandford Lampl, who was at that time attorney for one of the parties in the Monsour case and was presumably knowledgable about the law, and who is the attorney for the Debtor in this Jeannette case, knew that the Creditors' Committee had no standing in this case now before this Court, either to sue and/or to engage co-counsel to sue on any basis much less a "contingent fee" basis, and to this very day the Debtor's attorney has not objected to the same.

[7] In this case at bar, as above noted, the Trustee in fact entered suit to avoid the alleged "fraudulent conveyance" and there was absolutely no reason of any kind for the Unsecured Creditors' Committee to join this action as a co-plaintiff especially when Mr. Campbell was representing both the Trustee and the Committee of Unsecured Creditors in this above-captioned case.

Although it is clear that this Court not only has the power but will in fact exercise the power (See F.R.C.P. 21) sua sponte to dismiss the Unsecured Creditors' Committee as a party-plaintiff in this case which will moot many other serious ethical considerations involved in this case, this Court will nevertheless touch upon some of the many ethical problems that have arisen in this matter which will demonstrate that a Chapter 11 Reorganization of this Debtor (even in liquidation) is now being maintained for bad faith reasons. It will be noted as this Opinion unfolds, that it was from the very beginning of the "fraudulent conveyance" litigation, impossible in good faith and in keeping with the Pennsylvania Code of Professional Responsibility for plaintiffs' attorneys to litigate the "fraudulent conveyance" matter on a Bankruptcy Court Ordered "contingent fee basis" in the case at bar and to simultaneously and properly represent and advise the hundreds of multiple clients who have adverse and conflicting legal interests in the underlying bankruptcy matter and in this "fraudulent conveyance litigation" which are now before this Court.

Some of the ethical problems in this case that are addressed by the Pennsylvania Code of Professional Responsibility will now be addressed in this Opinion.

[8] A lawyer should be very cautious and slow before obtaining a financial interest in his client's litigation, especially where as in this case, the client-debtor has sufficient funds on hand to afford an attorney on an hourly basis.

The usual and ordinary justification for entering into a contingent fee arrangement is to make certain that indigent and/or financially less affluent persons can obtain lawyers of their choice.

The Pennsylvania Code of Professional Responsibility (hereinafter referred to as "Ethics Code") provides in several relevant sections as follows:

[356] [356] Canon 5

A Lawyer Should Exercise Independent Professional Judgment on Behalf of a Client

ETHICAL CONSIDERATIONS

EC 5-1. *The professional judgment of a lawyer should be exercised, within the bounds of the law, solely for the benefit of his client and free of compromising influences and loyalties. Neither his personal interests, the interests of other clients, nor the desires of third persons should be permitted to dilute his loyalty to his client.*

EC 5-2. *A lawyer should not accept proffered employment if his personal interests or desires will, or there is a reasonable probability that they will, affect adversely the advice to be given or services to be rendered the prospective client. After accepting employment, a lawyer carefully should refrain from acquiring a property right or assuming a position that would tend to make his judgment less protective of the interests of his client.*

EC 5-3. *The self-interest of a lawyer resulting from his ownership of property in which his client also has an interest or which may affect property of his client may interfere with the exercise of free judgment on behalf of his client.* If such interference would occur with respect to a prospective client, a lawyer should decline employment proffered by him. *After accepting employment, a lawyer should not acquire property rights that would adversely affect*

*his professional judgment in the representation of his client. Even if the property interests of a lawyer do not presently interfere with the exercise of his independent judgment, but the likelihood of interference can reasonably be foreseen by him, a lawyer should explain the situation to his client and should decline employment or withdraw unless the client consents to the continuance of the relationship after full disclosure.* A lawyer should not seek to persuade his client to permit him to invest in an undertaking of his client, nor make improper use of his professional relationship to influence his client . . .

EC 5-7. *The possibility of an adverse effect upon the exercise of free judgment by a lawyer on behalf of his client during litigation generally makes it undesirable for the lawyer to acquire a proprietary interest in the cause of his client or otherwise to become financially interested in the outcome of the litigation.* However it is not improper for a lawyer to protect his right to collect a fee for his services by the assertion of legally permissible liens, even though by doing so he may acquire an interest in the outcome of litigation. *Although a contingent fee arrangement gives a lawyer a financial interest in the outcome of litigation, a reasonable contingent fee is permissible in civil cases because it may be the only means by which a layman can obtain the services of a lawyer of his choice. But a lawyer, because he is in a better position to evaluate a cause of action, should enter into a contingent fee arrangement only in those instances where the arrangement will be beneficial to the client.*

The basic ethical problem in this case arose because the "contingent fee arrangement" in regard to the "fraudulent conveyance litigation" was not entered into between the plaintiff attorneys and the clients (the unsecured creditors.) In this case, the record of this case clearly shows that the "contingent fee arrangement" was created by the order of a Bankruptcy Judge in an ex parte unscheduled hearing without any recorded notice to any of the unsecured creditors and/or their attorneys, and without the knowledge, advice, vote and/or consent of said unsecured creditors who are the real parties in interest.

The "Ethics Code" provides in relevant part that the "consent"[1] of the client is critical to the attorney-client relationship.

> EC 7-8. *A lawyer should exert his best efforts to insure that decisions of his client are made only after the client has been informed of relevant considerations.* A lawyer ought to initiate this
> [357] decision-making process if the client does [357] not do so. Advice of a lawyer to his client need not be confined to purely legal considerations. *A lawyer should advise his client of the possible effect of each legal alternative.* A lawyer should bring to bear upon this decision-making process the fullness of his experience as well as his objective viewpoint. In assisting his client to reach a proper decision, it is often desirable for a lawyer to point out those factors which may lead to a decision that is morally just as well as legally permissible. He may emphasize the possibility of harsh consequences that might result from assertion of legally permissible positions. *In the final analysis, however, the lawyer should always remember that the decision whether to forego legally available objectives or methods because of non-legal factors is ultimately for the client and not for himself.*

DISCIPLINARY RULES

DR 5-101. Refusing Employment When the Interests of the Lawyer May Impair His Independent Professional Judgment.

(A) *Except with the consent of his client after full disclosure, a lawyer shall not accept employment if the exercise of his professional judgment on behalf of his client will be or reasonably may be affected by his own financial, business, property, or personal interests.*

DR 5-103. Avoiding Acquisition of Interest in Litigation.

(A) *A lawyer shall not acquire a proprietary interest in the cause of action or subject matter of litigation he is conducting for a client, except that he may:*

(1) Acquire a lien granted by law to secure his fee or expenses.

(2) *Contract with a client for a reasonable contingent fee in a civil case.*

(There was no attorney-client contingent fee arrangement in this case)

[9] It is true that in a proper case a lawyer may take a bankrupt debtor's case such as this "fraudulent conveyance litigation" on a contingent fee basis, but as will be discussed later in this Opinion, there first must be a hearing convened after proper notice to all interested parties and then a "cost-benefit" hearing must be held to determine the propriety of conducting litigation for the bankrupt debtor on any basis. There was no such "cost-benefit" hearing scheduled, noticed or held in this case at bar.

As more fully discussed elsewhere in this Opinion, plaintiffs attorney, Mr. Campbell, who has openly admitted to having a personal vested financial interest in this "fraudulent conveyance litigation",[1] also admittedly took it upon himself to reject an offer of settlement in the amount of $1,250,000.00, without notice, contact, with or advice to his clients,[2] the Unsecured Creditors. This action on the part of said plaintiff attorney is contrary to the following provisions of the "Ethics Code".

DR 5-106. Settling Similar Claims of Clients.

(A) *A lawyer who represents two or more clients shall not make or participate in the making of an aggregate settlement of the claims of or against his clients, unless each client has consented to the settlement after being advised of the existence and nature of all of the claims involved in the proposed settlement, of the total amount of the settlement, and of the participation of each person in the settlement.*

EC 7-7. *In certain areas of legal representation not affecting the merits of the cause or substantially prejudicing the rights of a client, a lawyer is entitled to make decisions on his own. But, otherwise the authority to make decisions is exclusively that of the client and, if made within the frame-* [358] *work of the law, such decisions are binding on his lawyer. As typical examples in civil cases, it is for the client to decide whether he will accept a settlement offer.*

(See Appendix Document Nos. 33, 16 and 17)

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[1] *See* Pages 43, 44, 45 of Findings of Fact. *See* also Appendix Document No. 16, beginning at page 42, line 9, thru page 44. *See* letter continuing the offer of settlement indefinitely, Appendix Document No. 17, Bankruptcy Docket Entry No. 1389.

[2] *See* references in footnote 1 above. *See* also Appendix Document No. 6, page 18.

Additionally, and as more fully discussed elsewhere in this Opinion, said plaintiff attorneys violated many of the provisions of the "Ethics Code" when without any notice, advice, discussion and/or consent from the Unsecured Creditors they moved this Court to extend the "bar date" in lieu of converting this case from Chapter 11 to Chapter 7 of the Bankruptcy Code. As more fully discussed elsewhere in this Opinion, the granting of this motion as submitted to this Court would have impacted very adversely against the best financial interests of the Unsecured Trade Creditors who were the very parties who had originally engaged the plaintiff attorneys, Campbell and Levine in the bankrupty proceeding and Mansmann, Cindrich and Huber in the "fraudulent conveyance litigation".

Further, the granting of the Motion to Extend the "bar date" in lieu of conversion would have insured the continuation of the plaintiff attorneys' admitted vested personal financial interest in the "fraudulent conveyance litigation", since said plaintiff attorneys would be discharged from said case by operation of law if the bankruptcy case were to be converted from Chapter 11 to Chapter 7. The relevant sections of the "Ethics Code" that were violated by plaintiffs' attorneys in this instance are as follows:

DR 5-105. Refusing to Accept or Continue Employment if the Interests of Another Client May Impair the Independent Professional Judgment of the Lawyer.

(A) *A lawyer shall decline proffered employment if the exercise of his independent professional judgment in behalf of a client will be or is likely to be adversely affected by the acceptance of the*

*proffered employment, or if it would be likely to involve him in representing differing interests, except to the extent permitted under DR 5-105(C).*

(B) *A lawyer shall not continue multiple employment if the exercise of his independent professional judgment in behalf of a client will be or is likely to be adversely affected by his representation of another client, or if it would be likely to involve him in representing differing interests except to the extent permitted under DR 5-105(C)*

(C) *In the situations covered by DR 5-105(A) and (B), a lawyer may represent multiple clients if it is obvious that he can adequately represent the interest of each and if each consents to the representation after full disclosure of the possible effect of such representation on the exercise of his independent professional judgment on behalf of each.*

(D) *If a lawyer is required to decline employment or to withdraw from employment under a Disciplinary Rule, no partner, associate or any other lawyer affiliated with him or his firm may accept or continue such employment.*

Amended April 29, 1977, effective May 14, 1977; amended and effective June 28, 1977.

Interests of Multiple Clients

EC 5-14. *Maintaining the independence of professional judgment required of a lawyer precludes his acceptance or continuation of employment that will adversely affect his judgment on behalf of or dilute his loyalty to a client. This problem arises whenever a lawyer is asked to represent two or more*

*clients who may have differing interests, whether such interests be conflicting, inconsistent, diverse or otherwise discordant.*

EC 5-15. *If a lawyer is requested to undertake or to continue representation of multiple clients having potentially differing interests, he must weigh carefully the possibility that his judgment may be impaired or his loyalty divided if he accepts or continues the employment. He should resolve all*
[359] [359] *doubts against the propriety of the representation. A lawyer should never represent in litigation multiple clients with differing interests; and there are few situations in which he would be justified in representing in litigation multiple clients with potentially differing interests. If a lawyer accepted such employment and the interests did become actually differing, he would have to withdraw from employment with likelihood of resulting hardship on the clients; and for this reason it is preferable that he refuse the employment initially.* On the other hand, there are many instances in which a lawyer may properly serve multiple clients having potentially differing interests in matters not involving litigation. If the interests vary only slightly, it is generally likely that the lawyer will not be subjected to an adverse influence and that he can retain his independent judgment on behalf of each client; and if the interests become differing, withdrawal is less likely to have a disruptive effect upon the causes of his clients.

EC 5-16. *In those instances in which a lawyer is justified in representing two or more clients having differing interests, it is nevertheless essential that each client be given the opportunity to evaluate his*

*need for representation free of any potential conflict and to obtain other counsel if he so desires. Thus before a lawyer may represent multiple clients, he should explain fully to each client the implications of the common representation and should accept or continue employment only if the clients consent. If there are present other circumstances that might cause any of the multiple clients to question the undivided loyalty of the lawyer, he should also advise all of the clients of those circumstances.*

(See Appendix Document No. 33)

The Court of Appeals in the case *Re STN Enterprises,* 779 F.2d at 905, lays out the legal considerations that must be addressed by a bankruptcy court prior to granting the Trustee or Debtor or Creditor's Committee (in a proper case) Standing to Sue to recover preferentially and/or fraudulently transferred assets.

First the moving party who is demanding the initiation of litigation to recover the Debtor's assets must present to the bankruptcy court a colorable claim for relief that upon an appropriate proffer of proof would support the claimed recovery.

The Court of Appeals *in re STN Enterprises, Id.* at 905, 906, went on to say:

> "If the committee presents a colorable claim or claims for relief that on appropriate proof would support a recovery, the district (or bankruptcy) court's threshold inquiry will still not be at an end. In order to decide whether the debtor unjustifiably failed to bring suit so as to give the creditors' committee standing to bring an action, the court must also examine, on affidavit and other submission, by evidentiary hearing or otherwise,

whether an action asserting such claim(s) is likely to benefit the reorganization estate." *See Toledo Equipment Co.*, 35 Bankr. at 320.

The court's inquiries will involve in the first instance not only a determination of probabilities of legal success and financial recovery in event of success, but also a determination as to whether it would be preferable to appoint a trustee in lieu of the creditors' committee to bring suit (bearing in mind any fees imposed on the estate by such an appointment, the wishes of the parties, and other relevant factors) and the terms relative to attorneys' fees on which suit might be brought. The creditors who compose the committee may agree themselves to be responsible for all attorneys' fees, but if they would seek to impose such fees on other creditors or the Chapter 11 estate, whether by contingent fee arrangement or otherwise, that would obviously affect the cost-benefit analysis the court must make in determining whether to grant leave to sue. Hence fee arrangements should not only be made a matter of record but should be carefully examined by the court as it makes that determination.

[360] [360] We do not mean to suggest that the court need undertake a mini-trial, *cf. Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 177-78, 94 S.Ct. 2140, 2152, 40 L.Ed. 2d 732 (1974) (no mini-trial in class actions), to determine likelihood of success in such a suit or the attendant fees and expenses involved. But it should assure itself that there is sufficient likelihood of success to justify the anticipated delay and expense to the bankruptcy estate that the initiation and continuation of litigation will likely produce. Of course, if the creditors' committee

represents that its fee arrangement with its attorney will in no event impose a net burden on the bankruptcy estate (because the committee will pay the fee and seek reimbursement only out of any recovery), then the preliminary inquiry can be limited to ascertaining whether the proposed lawsuit has a colorable basis on which to proceed.

[NOTE (It is apparent from the Second Court of Appeal's references in the above quoted passage from the STN case to the Eisen case to class actions" that in actions to recover "fraudulent conveyances" from third parties the preferable and more ethically correct method of litigating for the benefit of the real parties in interest, i.e. the unsecured creditors, (who have many conflicting financial interests) would be in the context of a class action.)]

In this above-captioned case, there was absolutely no informational notice at all that was distributed to the unsecured creditors informing them that the bankruptcy court was about to consider the appointment of a Bankruptcy Trustee who would then be given permission to file suit along with the Committee of Unsecured Creditors as co-plaintiffs to recover a fraudulent conveyance. Neither was there informational notice that the Unsecured Creditors Committee would be given permission to hire co-counsel to the Trustee's counsel on a contingent fee basis without any knowledge, discussion, advice and/or consent of said "Unsecured Creditors".

The hearing which gave rise to the above-mentioned July 27 and 28, 1983, Bankruptcy Court Orders was scheduled as a "hearing on the objections to the Adequacy of the Debtor's Disclosure Statement" as recited in the July 27, 1983, Order, (Appendix Document

No. 2, second page.) Additionally, that announced hearing for reasons given therein was rendered moot and cancelled per said July 27, 1983, Order. The Bankruptcy Court then immediately and without prior notice went into the unscheduled and unannounced matters concerning the suit to recover the "fraudulent conveyance", the engagement of co-counsel and the "contingent fee". There was neither consent nor knowledge of the Unsecured Creditors. The only consent and approval came from the attorney for the Debtor, Sanford M. Lampl and the attorney for the Creditors' Committee, Douglas Campbell. (See Pages 1 through 6 of Appendix Document No. 2)

As hereinabove noted in this Opinion, the Pennsylvania Code of Professional Responsibility under the then and now circumstances of this case absolutely would forbid Campbell and Levine and Mansmann, Cindrich and Huber from taking this case on a contingent fee basis without a "cost-benefit" hearing after notice to interested parties.

Also, as heretofore noted, only the Trustee alone had Standing to Sue under the circumstances of this case.

Because the identities and the full extent of the conflicting and differing legal and financial interests of all of the class of "Unsecured Creditors" were not known, the class action approach absolutely is and was the only manner in which this case could have been or can be litigated in a ethically proper manner. (See references to Law Review Articles, infra)

This District Judge early on identified the many ethical problems in this case, but with the exception of Attorney Beard and Humphreys, was met with unreasoning resistance by the lawyers in this case. It is apparent to this District Judge that plaintiffs' lawyers do

not appear to grasp or understand the procedural and ethical difficulties in this "fraudulent conveyance" case
[361] and the defense attorneys in bad faith [361] are interested in procrastination and delay. The Debtor's original attorneys' participation and ongoing advice in this case has been chilled by the official contention of the Trustee to the effect that said Debtor's attorneys former and present should disgorge all prior attorney fees received in this case because of said Debtor attorneys alleged unethical and improper representation of the Debtor. (See Appendix Document No. 6, Page 12) On the other hand the Debtor's Attorney, Pappone who prepared and is proposing the Debtor's Plan of Reorganization which contains a one and one-fourth million dollar offer to settle the "fraudulent conveyance" litigation, is being paid by the defendants in the above-captioned "fraudulent conveyance" litigation case which is very unethical conduct and is contrary to Ethical Considerations, EC 5-21; EC 5-2 and Disciplinary Rule DR 5-107, set out in full as follows: (See Appendix Document No. 33)

Desires of Third Persons-"Fraudulent Conveyance Litigation"

EC 5-21 *The obligation of a lawyer to exercise professional judgment solely on behalf of his client requires that he disregard the desires of others that might impair his free judgment. The desires of a third person will seldom adversely affect a lawyer unless that person is in a position to exert strong economic, political, or social pressures upon the lawyer.* These influences are often subtle, and a lawyer must be alert to their existence. *A lawyer subjected to outside pressures should make full disclosure of them to his client, and if he or his client believes that the effectiveness of his*

*representation has been or will be impaired thereby, the lawyer should take proper steps to withdraw from representation of his client.*

EC 5-22 *Economic, political, or social pressures by third persons are less likely to impinge upon the independent judgment of a lawyer in a matter in which he is compensated directly by his client and his professional work is exclusively with his client. On the other hand, if a lawyer is compensated from a source other than his client, he may feel a sense of responsibility to someone other than his client.*

EC 5-23 *A person or organization that pays or furnishes lawyers to represent others possesses a potential power to exert strong pressures against the independent judgment of those lawyers. Some employers may be interested in furthering their own economic, political, or social goals without regard to the professional responsibility of the lawyer to his individual client.* Others may be far more concerned with establishment or extension of legal principles than in the immediate protection of the rights of the lawyer's individual client. On some occasion, decisions on priority of work may be made by the employer rather than the lawyer with the result that prosecution of work already undertaken for clients is postponed to their detriment. *Similarly, an employer may seek, consciously or unconsciously, to further its own economic interests through the actions of the lawyers employed by it. Since a lawyer must always be free to exercise his professional judgment without regard to the interests or motives of a third person, the lawyer who is employed by one to represent another must constantly guard against erosion of his professional freedom.*

DR 5-107 Avoiding Influence by Others Than the Client.

(A) *Except with the consent of his client after full disclosure, a lawyer shall not:*

(1) *Accept compensation for his legal services from one other than his client.*

(2) *Accept from one other than his client any thing of value related to his representation of, or his employment by his client.*

(B) *A lawyer shall not permit a person who recommends, employs, or pays him to render legal services for another to direct or regulate his professional judgment in rendering such legal services.*

[362] [362] (See supra pages 33 to 37 of the hearing transcript, Appendix Document No. 16, wherein Attorney Pappone admits that he is being paid by the defendants in the "fraudulent conveyance" litigation to prepare and present a Plan of Reorganization for the Debtor, Jeannette Corp.)

Although the plaintiff attorneys in the above-captioned case were in fact proceeding without a proper and legal authorization, it was conceivable early on as a "very long shot" proposition that they could have "pulled" their "gambit" off successfully since this District Court was not then at all aware of the unethical machinations that occurred in the bankruptcy court that finally brought this "fraudulent conveyance" case to the United States District Court.

However, fate was not kind to the plaintiff attorneys. The first unkind act of fate intervened in this scenario when the plaintiffs alleged a cause of action under the

Racketeer Influenced and Corrupt Organization Act (18 U.S.C. Sec. 1961 et seq.) and violations of the Pennsylvania Fraudulent Conveyance Act (39 P.S. Sec. 351, et seq.) against the within defendants and at the time of plaintiffs' complaint there was pending in the United States Third Circuit Court of Appeals a very similar group of cases known collectively as "Gleneagles". *United States v. Tabor Court Realty Corp.*, 803 F.2d 1288 (3rd Cir.1986) *cert. denied sub nom. McClellan Realty Co. v. U.S.*, _____ U.S. _____, 107 S.Ct. 3229, 97 L.Ed.2d 735 (1987).

This District Court Judge felt that it would be wise to hold the trial of this above-captioned case in abeyance in order to await the outcome of Gleneagles which would give needed guidance to this Court. Further, this District Court at that time did not know about the "contingent fee" Court Order, but this Court was concerned about conserving the assets of the Debtor. At least $141,000.00, (and probably more) of the Debtor's assets have already been spent in this "fraudulent conveyance" litigation for expenses only. (See Appendix Document No. 24)

About six months before the United States Supreme Court refused to review the lower court result in Gleneagles, (June 22, 1987) a second stroke of misfortune struck the plaintiff attorneys.

The defendants in early December 1986, offered to settle the within case for one and one quarter million dollars. (See Appendix Document No. 17) At that moment as has been already discussed in this Opinion, the plaintiffs and their attorneys were placed in an impossible position because this case was not certified as a class action. The plaintiffs' attorneys have stubbornly and unreasonably refused to go the "class action way". (See Bankruptcy Rule No. 7023)

Undoubtedly, the real parties in interest are over 2000 Unsecured Creditors; and the plaintiffs' attorneys, even where there are multiple clients involved, are obligated (prior to refusing or accepting an offer of settlement), to in some way inform these Unsecured Creditors of all of the advantages and disadvantages of settlement, so that said Creditors may intelligently determine whether to accept or reject the same. (See the discussion of the ethical consideration heretofore set forth in this opinion and particularly DR 5-106 and EC 7-7 of the Pennsylvania Code of Professional Responsibility Appendix Document No. 33)

Instead of advising and explaining to their clients, (the Unsecured Creditors) the merits or demerits of the proposed settlements as is required by law, the Trustee and his attorneys unilaterally and without notice, discussion or explanation refused the offer of settlement. (See Appendix Document No. 6, page 18)

At this point, the plaintiffs' attorneys were placed again on the horns of a dilemma.

First: As heretofore noted the plaintiffs' attorneys got into this case without first explaining to all of the Unsecured Creditors the "pros and cons" as to whether this case could be tried successfully and further, said plaintiffs' attorneys filed this case without the very great majority of said Unsecured Creditors' knowledge, consent or chance to be heard. Further, the Bankruptcy Court did not conduct a fact finding hearing and/or a
[363] cost-benefit hear- [363] ing after proper notice, to determine if the proposed "fraudulent conveyance" litigation was legally viable and beneficial to this Debtor's estate.

*Second:* As above noted and acting contrary to the Provisions of the Pennsylvania Code of Professional Responsibility and without even an attempt at notifying the several thousands of Unsecured Creditors, the plaintiffs and their attorneys improperly refused the offer of settlement out of hand which they had no lawful right to so do. (See discussion of Ethical Consideration, supra)

As a practical matter the Unsecured Creditors could not have been notified as to the proposed settlement since all of their identities and financial interests were not known then or even now known by the plaintiffs' attorneys.

*Third:* Under the Pennsylvania Code of Professional Responsibility the plaintiffs' attorneys had disqualified themselves as proper attorneys to advise the Unsecured Creditors as to whether they should settle or not since one of those attorneys, Douglas Campbell freely admitted that he, Campbell, had and continued to have a personal vested financial interest in the outcome of the litigation, and under the circumstances at that time said plaintiffs' attorneys should have withdrawn from this litigation because of their admitted conflict of interest.

(See pages 42 to 44 of hearing transcript of December 9, 1986, set out in full, supra. See also said transcript Appendix Document No. 16. See also the discussion of Ethical Considerations, supra and Appendix Document No. 33)

The Plaintiffs' attorneys tried to solve their dilemma by proposing to the Bankruptcy Court the Fifth Plan of Reorganization. (The Trustee's Plan, which was in fact a Liquidation Plan) (See Appendix Document Nos. 5, 6 and 7) The provisions of the Trustee's Plan permitted a vote by the Unsecured Creditors to ratify and/or approve the

Trustee's prior rejection of the proposed one and one-fourth million dollar offer of settlement by the defendants without any thorough discussion, explanation or analysis as to the adequacy of amount offered, the benefits to the Unsecured Creditors, versus the benefits of continuing the litigation. Further, the Trustee's Disclosure Statement did not mention the legal consequences of the plaintiffs' attorney's personal vested financial interest in refusing the proposed settlement, and in effect as above-noted, the Unsecured Creditors were requested to ratify the plaintiffs' attorneys rejection of the offer of settlement without giving said Unsecured Creditors a chance to approve the settlement offer and without giving said Unsecured Creditors any dispassionate objective legal advice of any kind whatsoever for said Unsecured Creditor's guidance in the casting of their votes on said Plans, all of which was contrary to the Pennsylvania Code of Professional Responsibility. (See Discussion on Ethical Considerations, Supra)

In the meantime, the Debtor purportedly filed a counter Plan (the Sixth Plan) of Reorganization (also in fact a Liquidation Plan) which discussed the legal and practical reasons why the settlement offer of one and one-fourth million dollars should be accepted by the Unsecured Creditors. This Plan was filed for the Debtor by Mr. Pappone who in fact and unethically was being paid by the defendants in the "fraudulent conveyance" litigation. (See Page 41 of the Findings of Fact herein as italicized.)

A Disclosure hearing on the Debtor's plan was requested by the Debtor. The Bankruptcy Judge, however, only allowed a hearing on the Trustee's proposed Plan (Fifth Plan) and the Trustee's Disclosure

Statement and for unexplained reasons the Bankruptcy Judge refused to have the requested hearing as to the Debtor's competing Disclosure Statement.

Even though it is clear beyond any doubt as above noted, that the names and amount of financial interests of all the Unsecured Creditors were and are presently unknown, the Bankruptcy Judge ordered hearing notices as to the Trustee's Plan to be sent out to the "Unsecured Creditors". After having refused to consider
364] the Debtor's oppos- [364] ing Plan (Sixth Plan) of Reorganization at the hearing on the Trustee's Plan held by the Bankruptcy Court on December 9, 1986, (See Hearing Transcript Appendix Document No. 16) and even though it was impossible for the Unsecured Creditors to vote on the Plan at that time (December 9, 1986, and it is still to this date impossible to identify the voting Unsecured Creditors and/or their dollar interests and even into the foreseeable future) the Bankruptcy Judge nevertheless unreasonably ordered the Trustee's Plan to be submitted to the "Unsecured Creditors" for a vote.

On December 16, 1986, after the "so-called" hearing of December 9, 1986, the Trustee's Attorney Campbell suggested a supplement to the Trustee's Disclosure Statement which disclosed the developments in the Gleneagles Case and that the Debtor had proposed a new Plan of Reorganization wherein the Debtor would settle the "fraudulent conveyance" litigation for one and one-fourth million dollars. (See Appendix Document No. 7)

This "so-called" supplement was captioned, "Notice of Information Which Developed After The Filing of The Trustee's Disclosure Statement", and did not give the Unsecured Creditors an opportunity to vote on whether to accept the settlement offer referred to. In fact as

stated on page 18 of the Trustee's Disclosure Statement, (last full paragraph) "A seven figure settlement offer has been made by the (SIC) defendants but was refused." As heretofore discussed, under the Pennsylvania Code of Professional Responsibility, (See Appendix Document No. 33) the Trustee and/or plaintiffs' attorneys could not properly turn down the offer of settlement without the vote of all of the Unsecured Creditors on the proposed settlement.

This arbitrary and clearly erroneous action of the Bankruptcy Judge in allowing this Trustee's Plan to be submitted to the "Unsecured Creditors" for a vote but denying the Unsecured Creditors a chance to vote on the Debtor's Plan was appealed to this Court in due course.

(In the light of the above-recited complication and unethical activity, this District Court withdrew the references as to both Plans of Reorganization from the Bankruptcy Court to the District Court.)

Next a third stroke of misfortune struck the plaintiffs' attorneys in the "fraudulent conveyance" case.

After observing all of the problems and conflicts of interest that had obviously developed to a point where this "fraudulent conveyance litigation" was becoming impossible to bring to trial on an ethically acceptable basis, (because (1) the unsecured financial interests of over 1100 active and inactive employees of the Debtor and the unsecured financial interests of 882 of the trade creditors in the instant "fraudulent conveyance litigation" were clashing irreconciably and that; (2) this Court was presented with the professionally irresponsible action of the Trustee's attorneys attempting to represent the conflicting interests of the unsecured trade creditors and the conflicting interests of the employee unsecured creditors, simultaneously) this District Court encouraged

Attorney Phillip Beard to more actively represent the Debtor's 1100 plus active and inactive employees. This Court also encouraged and appointed Attorney David Humphreys on July 9, 1987, to represent the 882 unsecured trade creditors.

After the submission of the Fifth and Sixth Plans of Reorganization, Attorney Beard delved into this case in greater detail. He then took several actions that became the Trustee's attorneys' fourth stroke of misfortune.

In due time Attorney Beard filed approximately sixteen million dollars of new and unscheduled claims for the active and retired Debtor employees.

Because it could be argued that some of these employee unsecured claims were subject to a possible valid objection, i.e., that they were filed after the "bar date" of October 31, 1983, Attorney Beard filed two motions, the granting of either or both would moot the objection to the alleged late filing of the unsecured Debtor employee's belated claims.

[365] [365] Attorney Beard first moved to withdraw the reference on the question of "conversion" from the Bankruptcy Court to the United States District Court. Attorney Beard next moved this District Court to convert the Debtor's bankruptcy proceeding from Chapter Eleven of the United States Bankruptcy Code to Chapter Seven. (See Appendix Document No. 22) If approved, this action would signal the beginning of a new period to make claims, a new "bar date", and the dismissal of Moody, the Trustee, along with his attorneys, Campbell and Levine and Mansmann, Cindrich and Huber (Titus) would follow as a matter of law.

In the alternative, Mr. Beard moved this District Court to extend the "bar date" (October 31, 1983) to a time after Mr. Beard had filed the unsecured Debtor employee new claims.

There could be no doubt that the financial interests of the other group of Unsecured Creditors, namely, 882 trade creditors, would be very adversely affected by the infusion of 18 million dollars of new unsecured claims into this bankruptcy case. Mr. Humphreys, the attorney for the 882 "trade creditors" immediately bitterly opposed both of Mr. Beard's motions.

If the Trustee's (Plaintiff) attorneys had been well advised they would have "sat on the sideline" and allowed Mr. Beard and Mr. Humphrey to battle each other on these two motions. Instead said Trustee (Plaintiff) attorneys filed a Motion to Extend the Claims bar date in lieu of conversion. (See Appendix Document No. 31 which is a copy of said motion and Document No. 32, which is a "Joint Memorandum in Opposition to the Trustee's Motion to Extend the "claims bar date" in Lieu of Conversion".)

With Mr. Campbell openly admitting that as of December 9, 1986, he and Co-counsel Cindrich had personal vested financial interests in the "fraudulent conveyance" litigation, (See Supra and pages 42 to 44 of transcript of hearing December 9, 1986, and Appendix Document No. 16 contrary to Pennsylvania Code of Professional Responsibility) and admitting that they automatically would be removed as counsel for the Debtor-Trustee in the "fraudulent conveyance litigation" if the bankruptcy proceeding were to be converted from Chapter Eleven to Chapter Seven, (See line 6, page 24, of hearing transcript of December 9, 1986; See Appendix Document No. 16), it is clear that Attorneys Campbell

and Cindrich filed the motion to extend the "bar date" in lieu of "conversion" to protect their own "personal vested (33% contingent fee) interest" in the "fraudulent conveyance" litigation. This conclusion is suggested by the "fraudulent conveyance" defense attorneys in Appendix Document No. 28. By moving to have the "bar date" extended in lieu of conversion to protect their personal financial "contingent fee" interests in the "fraudulent conveyance litigation" and by moving to have the "fraudulent conveyance" case immediately tried, without advising any of the Unsecured Creditors about said Unsecured Creditors' right prior to any trial to be properly informed as to the pros and cons of the settlement offer and their right as Unsecured Creditors to vote on said proposed settlement offer of one and one quarter million dollars, said Attorneys Campbell and Cindrich clearly violated the Code of Professional Responsibility. (See Ethical Discussion, Supra) (See Appendix Document Nos. 27, 28 and 29)

Attorneys Campbell and Cindrich were specifically hired or engaged by a Committee of Unsecured Trade Creditors in this "fraudulent conveyance" litigation presumably to represent said Unsecured Trade Creditors' best financial interests. Here Campbell and Cindrich's motion to extend the "bar date" would, if allowed, increase the claims of the Unsecured Debtor employees and retirees up to eighteen million dollars to a finite sum of money. (i.e. the final cash balance on hand in the Debtor's bank account after administration expenses are paid.)

Prior to Attorney Beard's filing of the additional employee claims of some sixteen million dollars after the "bar date" of October 31, 1983, the employee claims were approximately one million dollars. So as to any final

[366] sum of money available for distri- [366] bution the Unsecured Trade Creditors would have received four dollars for every dollar given to the active or retired employees, assuming that none of the sixteen million dollars of employee claims are allowable if said claims were filed after the "bar date" of October 31, 1983.

On the other hand, if the Campbell-Cindrich Motion to Extend the "bar date" were granted to allow all late employee claims to be validly filed, the active and inactive employees as a group would then receive approximately four and one-half dollars for every dollar given to the Unsecured Trade Creditors. This motion of Campbell and Cindrich to extend the "bar date" is clearly adverse to the financial interests of the Unsecured Trade Creditors who, in fact, employed Attorneys Campbell and Cindrich to represent them in both the bankruptcy matter and in the "fraudulent conveyance" litigation. Of course this action of said two attorneys violates many sections of the Pennsylvania Code of Professional Responsibility. (See Ethical Discussion, Supra)

It seems clear that Attorneys Campbell and Cindrich have demonstrated from the beginning of this case that they have no concept of the duty of attorneys to be loyal to their clients.

This Court is convinced and the undisputed facts of this case supports the fair inference that Attorneys Campbell and Cindrich oppose the conversion of this case from Chapter Eleven to Chapter Seven for "pure bad faith selfish financial reasons", namely, their admitted vested financial interest as attorneys in this "fraudulent conveyance" case, and their fear of losing out as counsel for the plaintiff in this "fraudulent conveyance litigation" if this bankruptcy case is converted from Chapter Eleven to Chapter Seven. (See Appendix Document Nos. 16 and 28)

As heretofore noted, the reason that contingent fee arrangements are permitted is to encourage lawyers to offer legal services to deserving litigants who lack sufficient money to litigate and pay for the same on an hourly basis. In this case as aforementioned the Debtor had more than one and one-half million dollars of cash in the bank and presently has more than two million dollars on deposit. There was never any need for a one-third contingent fee agreement in this "fraudulent conveyance" case and if there had been a bankruptcy court hearing that would have established, after a cost-benefit analysis that the litigation should go forward on a "class action" basis, none of these ethical problems would have arisen. This bad faith hope for a gigantic reward of twelve million dollar attorney fee for success in this litigation by the plaintiff's attorneys and their apparent lack of knowledge of the Pennsylvania Code of Professional Responsibility is the root cause of the problems and delay that have beset this matter over the last five years.

Because this Chapter 11 proceeding is presently being maintained for bad faith unethical reasons, this bankruptcy proceeding must be converted to Chapter 7 of the Bankruptcy Code, as amended, for just cause.

## SUMMARY

For the foregoing reasons (four separate and distinct reasons), this bankruptcy matter filed at Bankruptcy No. 82-3265, in the United States Bankruptcy Court for the Western District of Pennsylvania, was converted from Chapter 11 proceeding to a Chapter 7 proceeding by the order of this United States District Court, dated March 15, 1988, and filed of record in Civil Action No. 83-2383, at Docket Entry No. 410.

Also, this entire case in the Bankruptcy Court as to the liquidation of the Debtor and as to contested claims and the on-going "fraudulent conveyance" action in the District Court should be addressed as a "class action" under the new Bankruptcy Rule No. 7023, and under the Federal Rules of Civil Procedure, Rule 23, *et seq.*

A reading of the following Law Review Articles by the several counsel of record will be very helpful in the future disposition of this case.

The Class Action and Bankruptcy: Tracking and Evolution of a Legal Principle. By Paul C.
[367] Wohlmuth, Vol. 21 [367] UCLA Law Review, Page 577 (1973) (See Appendix Doc. No. 37)

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Mandatory Certification of Settlement Classes, by Elizabeth Joan Cabraser. Vol. 10, Class Action Reports, Page 151, (1987). (See Appendix Doc. No. 38)

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Class Actions in Bankruptcy, by Jennifer Knauth Lipinski, Vol. 64 Texas Law Review, Page 791 (1985). (See Appendix Document No. 39)

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Leveraged Buyouts and Fraudulent Transfers: Life After Gleneagles, by David A. Murdoch, Linda D. Sartin and Robert A. Zadek, Vol. 43, The Business Lawyer, Page 1 (No. 1987) (See Appendix Document No. 40)

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Fraudulent Conveyance Concerns in Leveraged Buyout Lending, by Matthew T. Kirby, Kathleen G. McGuinnes and Christopher N. Kandel, Vol. 43 The Business Lawyer, Page 27 (Nov. 1987) (See Appendix Document No. 41)

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(NOTE: Appendix Document No. 17, (the letter extending indefinitely the offer of settlement of 1¼ million dollars in the "fraudulent conveyance case") was made part of the official record as Bankruptcy Docket Entry No. 1389.

**In re BERRY, Bernard James, and Klein, Robert Frederick.**

**Bankruptcy Nos. 79-143, 79-144.**

United States Bankruptcy Court, W.D. Pennsylvania.

April 21, 1988.

United States filed motion for reconsideration of order finding Internal Revenue Service in technical violation of discharge provisions of Bankruptcy Act and awarding sanctions and unspecified amount of interest on money bankrupts had offered to Internal Revenue Service in connection with offers of compromise. The Bankruptcy Court, Judith K. Fitzgerald, J., held that underlying tax debt in case Bankruptcy Act continued to exist even though when Internal Revenue Service was barred from pursuing collection activities against postpetition

property of debtors, thus, offers in compromise made by bankrupts were not "overpayments against taxes due" so as to allow award of interest on payments made and technical violation of discharge provisions of Bankruptcy Act.

Order accordingly.

1. **Bankruptcy** ⇦ 3411

Discharge under Bankruptcy Act is not payment or extinguishment of debt itself, but simply bars future legal proceedings to enforce debt against bankrupts. Bankr. Act, §14(f), 11 U.S.C. (1976 Ed.) §32(f).

2. **Bankruptcy** ⇦ 2363

Underlying tax debt in case under the Bankruptcy Act continued to exist even though when Internal Revenue Service was barred from pursuing collection activities against postpetition property of debtors, thus, offers in compromise made by bankrupts were not "overpayments against taxes due" so as to allow award of interest on payments made in technical violation of discharge provisions of Bankruptcy Act, Bankr.Act, §§1 et seq., 14(f), 11 U.S.C.(1976 Ed.) §§1 et seq., 32(f).

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Douglas A. Campbell, David P. Braun, Campbell & Levine, Pittsburgh, Pa., for debtors.

Iryna A. Kwasny, Edward J. Snyder, Tax Div., U.S. Dept. of Justice, Washington, D.C., Craig R. McKay, Asst. U.S. Atty., Pittsburgh, Pa., Donna Pankowski, I.R.S., Pittsburgh, Pa., for the U.S.

## DOCUMENT E

**Order of Bankruptcy Court Dated July 27, 1983, Appointing the Trustee in the Chapter Eleven Case and Granting the Trustee Standing to Sue in the "Fraudulent Conveyance" Case**

IN THE
UNITED STATES BANKRUPTCY COURT
For the Western District of Pennsylvania

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Docket #165
Bankruptcy No. 82-3265

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IN THE MATTER OF:

JEANNETTE CORPORATION, t/a
JEANNETTE GLASS,

*Debtor.*

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*ORDER OF COURT*

AND NOW, to-wit, this 27th day of July, 1983;

IT APPEARING that a hearing has been scheduled on the objections to the adequacy of the Debtor's Disclosure Statement; and

IT APPEARING that said Disclosure Statement is in connection with a Plan of Reorganization predicated upon the sale by the Debtor of certain of its assets to Jeannette Industries, Inc. (Industries); and

IT APPEARING that Industries has withdrawn its offer to purchase said assets, as a result of which Debtor has notified the Court of its intent to withdraw the

pending Plan of Reorganization and Disclosure Statement; and

IT APPEARING that various items in connection with the administration of this case have been deferred, pending the submission of the Plan of Reorganization to Creditors; and

IT FURTHER APPEARING that, as a result of the withdrawal of the pending Plan of Reorganization, the administration of the within case should proceed with all deliberate speed.

NOW, THEREFORE, IT IS HEREBY ORDERED, ADJUDGED AND DECREED:

1. That leave be and hereby is granted to the Debtor to withdraw the pending Plan of Reorganization; and same is hereby deemed withdrawn; and that the Objections to the adequacy of the Disclosure Statement are thereby rendered moot and the hearing on said Objections is cancelled.

2. James Moody, is hereby appointed Trustee of Jeannette Corporation. The Trustee's powers shall be limited, until further Order of this Court or as provided herein, to the conducting of the sales of the assets hereinafter described. The officers of Debtor shall continue to operate its business subject to review by the Trustee.

3. That the Trustee is directed to conduct a public sale of all of the Jeannette Glass Division's assets, including but not limited to: real estate, leasehold interests, machinery, equipment, inventory, moulds, dies, deposits, prepaid expenses, accounts receivable, notes receivable due Jeannette Corporation and/or non-operating subsidiaries, books, records, customer lists, trade marks and trade names, under the following terms and conditions:

(a) That the sale shall be held on or before September 30, 1983.

(b) That the minimum price for said assets shall be $2,000,000.00. Credit shall be given to successful purchaser for accounts and notes receivable collected after the date hereof.

(c) That the sale shall be free and divested of all liens and encumbrances, including union contracts.

(d) That at confirmation the successful bidder shall deposit with the Trustee cash or certified funds in the amount of 10% of the successful bid.

(e) That such deposit shall be forfeited in the event the successful bidder fails to close pursuant to the terms and conditions of the sale.

(f) That closing on said sale shall be held within thirty (30) days after confirmation.

(g) That notice of sale shall be published in the *Wall Street Journal, The Pittsburgh Press, The Pittsburgh Legal Journal,* and *Home Furnishings Daily.*

(h) That within ten (10) days after this Order, the Trustee shall file a Complaint in proper form for the sale of the above assets free and clear of all liens and encumbrances.

4. In the event the Trustee fails to conduct such sale by September 30, 1983, his appointment shall be revoked, and a new Trustee appointed, unless the sale is postponed for reasons beyond the Trustee's control.

5. Until December 31, 1983, the Trustee shall permit the officers of the Debtor to operate Debtor's wholly owned subsidiary, Royal China, Inc. (Royal) in the

normal course of business with the proviso, however, that no unusual or extraordinary expenses shall be authorized without approval of this Court and that Royal shall not increase its administrative salaries or expenses beyond the level now extant.

6. The Trustee is hereby authorized and directed to solicit offers for the stock and/or all underlying assets of Royal, provided, that the minimum price to be realized, after paying and/or assuming the liabilities of Royal, must be at least $500,000.00.

7. That the Trustee is directed and authorized to attempt to effectuate an agreement with both Coca-Cola Bottling Company of New York, Inc. and Pension Benefit Guaranty Corp. to release the Royal assets from their respective claims, transferring such claims to the proceeds realized from any sale of Royal.

8. In the event that by December 31, 1983, such releases are unable to be obtained, this Court shall entertain Motions to consider whether the Trustee shall be directed to file a Voluntary Chapter 11 Petition for Royal under Chapter 11 of the Bankruptcy Code in this jurisdiction, to be consolidated with this case.

9. That at any such sales held, the Court hereby authorizes the Trustee to accept bids from corporations or other entities organized by shareholders, officers and/or directors, etc. of the Debtor; provided, that such bids are in the minimum amounts as established above; the Court herein finds that such entities are qualified to bid on and/or ultimately purchase the assets of the Debtor; and that there is no impropriety or disqualification in former shareholders, officers and/or directors attempting to purchase such assets provided third parties are given fair opportunity to purchase the same at a public sale.

10. That pending the sale of the Royal assets or Royal stock by the Trustee, the Trustee shall have full and complete access to all books and records of Royal provided however, the Trustee shall not unreasonably interfere with Royal's business operations.

11. That as of January 1, 1984, the Trustee's powers shall be enlarged to include all rights, powers and duties granted to a Trustee under the Bankruptcy Code.

12. That the Application of the Committee of Unsecured Creditors to Engage Co-Counsel and have Standing to Sue are hereby approved; and that a confirming Order shall be entered upon presentation of same by the Committee of Unsecured Creditors and/or its counsel. The Trustee is deemed to have joined in the Application to Engage Co-Counsel, and shall join the Committee of Unsecured Creditors as co-plaintiff in the actions contemplated in the Application for Standing to Sue.

13. That the Court finds that it is premature to approve the Application for Administrative Compensation filed by Campbell & Levine, Attorneys for the Creditors' Committee, before a date is set for a hearing on application for compensation for all professional fees. However, pending such hearing, the Court directs the Debtor to pay an interim allowance to Campbell & Levine, Attorneys for Unsecured Creditors' Committee, of $20,000.00, plus costs of $1,722.43. Such interim allowance shall be credited against any fee applications subsequently approved.

GERALD K. GIBSON
Gerald K. Gibson

The above Order is hereby
stipulated and consented to:

DOUGLAS A. CAMPBELL, ESQUIRE
Douglas A. Campbell, Esquire
Campbell & Levine
*Counsel for Creditors Committee*

SANFORD M. LAMPL, ESQUIRE
Sanford M. Lampl, Esquire
Lampl, Sable & Makoroff
*Co-Counsel for Jeannette Corporation, Debtor*

## DOCUMENT F

**Order of Bankruptcy Court Dated July 28, 1983, Authorizing the Trustee to Employ Attorneys to Represent Him**

MOODY, CONNELL & ASSOCIATES
Certified Public Accountants
421 Frick Building
Pittsburgh, Pa. 15219

(412) 391-3360

November 19, 1983

Theodore S. Hopkins, Clerk
U.S. Bankruptcy Court
1602 Federal Building
1000 Liberty Avenue
Pittsburgh, PA 15222

*Re: Jeannette Corporation*
*Chapter 11 Proceedings 82-3265*

Dear Mr. Hopkins:

Enclosed please find a copy of the Trustee's Application to Employ Attorneys and the Application by Trustee to Employ Accountants in the above matter.

Please note that these were approved by the Bankruptcy Judge on July 28, 1983. Would you please see that these are filed in the proper court file.

Yours very truly,

J. E. MOODY
J. E. Moody, CPA

JEM/lrs
Enclosures
cc: Douglas A. Campbell, Esquire

IN THE
UNITED STATES BANKRUPTCY COURT
For the Western District of Pennsylvania

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Docket #218
Bankruptcy No. 82-3265

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IN RE:

JEANNETTE CORPORATION, t/a
JEANNETTE GLASS,

*Debtor.*

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*TRUSTEE'S APPLICATION TO EMPLOY ATTORNEYS; DECLARATION OF PROPOSED ATTORNEY*

The Application of JAMES MOODY respectfully alleges:

1. Applicant is the duly qualified and acting Trustee in this case.

2. To perform his duties as Trustee, your applicant requires the services of attorneys for the following purposes:

a. To advise and consult with applicant concerning questions arising in the conduct of the administration of the estate and concerning applicant's rights and remedies with regard to the estate's assets and the claims of secured, preferred and unsecured creditors and other parties in interest;

b. To appear for, prosecute, defend and represent applicant's interest in suits arising in or related to this case;

c. To investigate and prosecute actions arising under the Trustee's avoiding powers; and

d. To assist in the preparation of such pleadings, motions, notices and orders as are required for the orderly administration of this estate; and to consult with and advise applicant in connection with the operation of or the termination of the operation of the business of the Debtor.

3. For the foregoing and all other necessary and proper purposes, applicant desires to retain generally the law firm of Campbell & Levine as counsel for the Trustee.

4. Because Campbell & Levine specializes in bankruptcy corporate reorganization and debtor/credit matters, because of its experience in those fields, and because of its extensive experience in this case to date as counsel to the petitioning creditors and counsel to the committee of unsecured creditors, applicant feels that said law firm is well qualified to render the foregoing services.

5. Based upon the Declaration attached hereto, applicant believes that said law firm and its members and associates do not hold or represent any interest adverse to that of your applicant or the Debtor estate, and that said law firm is a disinterested person within the meaning of 11 U.S.C. §101(3). It is contemplated that said attorneys will seek interim compensation during the case as permitted by 11 U.S.C. §331.

WHEREFORE, applicant prays that he be authorized to employ Campbell & Levine, generally, as his attorneys to render services in the areas described above, with compensation to be paid as an administrative expense in such amounts as this Court may hereinafter determine and allow.

Dated: July 28, 1983

J. E. MOODY
James Moody
*Trustee*

IN THE
UNITED STATES BANKRUPTCY COURT
For the Western District of Pennsylvania

---

Bankruptcy No. 82-3265

---

IN RE:

JEANNETTE CORPORATION, t/a
JEANNETTE GLASS,

*Debtor.*

---

*DECLARATION OF ATTORNEY*

I, DOUGLAS A. CAMPBELL, declare:

1. I am an attorney duly admitted to practice before all Courts of the Commonwealth of Pennsylvania, as well as this Court, and the Court of Appeals for the Third Circuit.

2. I am a member of Campbell & Levine, the law firm that the Trustee is seeking to employ generally by the Application to which this Declaration is attached. All of the members and associates of this law firm are similarly duly admitted to practice in this state and before this Court.

3. The law firm of Campbell & Levine has extensive experience in bankruptcy, insolvency corporate reorganization and debtor/credit law, and this case, in particular. The firm is well qualified to represent the Trustee generally herein, and is willing to accept employment on the basis set forth in the annexed Application.

4. The law firm of Campbell & Levine, its members and its associates, do not hold any interest adverse to the above-entitled estate, and said law firm is a disinterested person as defined in 11 U.S.C. §101(13). Further, upon approval of the Trustee's Application annexed hereto, Campbell & Levine will cease to serve as counsel to the committee of unsecured creditors.

I declare under penalty of perjury that the foregoing is true and correct.

Executed this 28th day of July 1983.

DOUGLAS A. CAMPBELL
Douglas A. Campbell
Campbell & Levine
220 Grant Street
Pittsburgh, Pennsylvania 15219
412/261-0310

IN THE
UNITED STATES BANKRUPTCY COURT
For the Western District of Pennsylvania

---

Bankruptcy No. 82-3265

---

IN RE:

JEANNETTE CORPORATION, t/a
JEANNETTE GLASS,

*Debtor.*

---

*ORDER*

AT PITTSBURGH, in said district, this 28th day of July, 1983, the Court having considered the foregoing Application of the Trustee to employ attorneys and Declaration of Douglas A. Campbell in support thereof, and it appearing that the law firm of Campbell & Levine, its members and associates, is a disinterested person, and that the employment of said law firm generally by the Trustee is in the best interest of this estate, it is hereby ORDERED that James Moody, Trustee herein, is authorized to employ the law firm of Campbell & Levine, generally, as attorneys for the Trustee and the estate, with compensation to be paid in such amounts as may be allowed by the Court upon proper application or applications therefor.

GERALD K. GIBSON, *J.*
*U.S. Bankruptcy Judge*

## DOCUMENT G

**Order of Bankruptcy Court Dated July 28, 1983, Granting the Committee of Unsecured Creditors "Standing to Sue" in the "Fraudulent Conveyance" Litigation**

IN THE
UNITED STATES BANKRUPTCY COURT
For the Western District of Pennsylvania

---

Docket #101
Chapter 11
Case No. 82-3265

---

IN RE:
JEANNETTE CORPORATION t/a
JEANNETTE GLASS,

*Debtor.*

---

*APPLICATION OF COMMITTEE OF UNSECURED CREDITORS TO THE DISTRICT COURT FOR STANDING TO SUE*

To: The Honorable Judges of the United States District Court for the Western District of Pennsylvania

The Committee of Unsecured Creditors of Jeannette Corporation ("Committee"), by its undersigned counsel, files the following application:

1. Contemporaneous with the filing of this Application, the Committee has filed with the Court a Motion to Withdraw Reference Of Bankruptcy Case,

("Motion to Withdraw"). The averments of fact set forth in the Motion to Withdraw are incorporated herein by reference.

2. The Motion to Withdraw sets forth with specificity the facts and circumstances comprising and arising out of a $12,110,800 stock purchase transaction on July 31, 1981 involving the Debtor, which is referred to therein and hereinafter as the "Fraudulent Transaction", as well as a fraudulent transfer of $2,407,351 after the commencement of the bankruptcy to or for the sole benefit of Jeannette Corporation's non-bankrupt corporate subsidiary, Royal China, which is referred to hereinafter as the "Royal China Transfer".

3. The Committee believes that the Estate of the Debtor-in-Possession has valid causes of action against the parties involved in and/or responsible for the Fraudulent Transaction and the Royal China Transfer which, if properly pursued, will result in a substantial dividend to the creditors of the Estate.

4. The Debtor-in-Possession is controlled by individuals or entities whose interest in the outcome of the litigation involving the Fraudulent Transaction and the Royal China Transfer is in conflict with the interests of the Estate and its creditors. Furthermore, the Debtor-in-Possession has stated its belief that the Estate's causes of action arising out of the Fraudulent Transaction are without value.

5. Throughout the course of the Fraudulent Transaction, present counsel to the Debtor-in-Possession acted as counsel to J. Corp. and John P. Brogan, both of whom would be named as Defendants in the proposed litigation.

6. Counsel to the Debtor-in-Possession was retained by individuals or entities whose interest in the outcome of the proposed litigation is adverse to that of the creditors and the Estate.

7. The Committee has implied authority to bring the proposed litigation and, under the circumstances, appropriate creditor protection requires that the Committee be authorized to file and pursue the same.

WHEREFORE, the Committee asks that an Order be entered granting the Committee standing to pursue and file litigation with regard to enforcing the estate's rights, claims and remedies arising out of the Fraudulent Transaction and the Royal China Transfer.

CAMPBELL & LEVINE
By: DOUGLAS A. CAMPBELL
Douglas A. Campbell
By: STANLEY E. LEVINE
Stanley E. Levine
Counsel for the Committee
of Unsecured Creditors
220 Grant Street
Pittsburgh, PA 15219-2198

MANSMANN, CINDRICH & HUBER
By: ROBERT CINDRICH
Robert Cindrich
Co-counsel for the Committee
of Unsecured Creditors
Two Chatham Center
Pittsburgh, PA 15219

IN THE
UNITED STATES BANKRUPTCY COURT
For the Western District of Pennsylvania

---

Chapter 11
Case No. 82-3265

---

IN RE:
JEANNETTE CORPORATION t/a
JEANNETTE GLASS,

*Debtor.*

---

*ORDER*

AT PITTSBURGH, in said District, this 28th day of July, 1983, upon consideration of the foregoing Application of Committee of Unsecured Creditors to the District Court for Standing to Sue, it is hereby Ordered, Adjudged & Decreed that the Committee of Unsecured Creditors of Jeannette Corporation be and hereby is granted standing to sue on behalf of the estate of Jeannette Corporation with regard to any rights, claims or interests the estate may have arising out of or with regard to the July 31, 1981 transaction referred to in said Application as the Fraudulent Transaction and/or arising out of any transfer to or for the benefit of Royal China.

GERALD K. GIBSON

## DOCUMENT H

**Order of Bankruptcy Court Dated July 28, 1983, Authorizing the Committee of Unsecured Creditors to Engage Co-Counsel**

IN THE
UNITED STATES BANKRUPTCY COURT
For the Western District of Pennsylvania

---

Docket #100
Chapter 11
Case No. 82-3265

---

IN RE:
JEANNETTE CORPORATION t/a
JEANNETTE GLASS,

*Debtor.*

---

*APPLICATION OF COMMITTEE OF UNSECURED CREDITORS TO THE DISTRICT COURT TO ENGAGE CO-COUNSEL*

To: The Honorable Judges of the United States District Court for the Western District of Pennsylvania

The Committee of Unsecured Creditors of Jeannette Corporation ("Committee") applies as follows:

1. Contemporaneous with the filing of this Application, the Committee filed, inter alia, the following:

a. Motion to Withdraw Reference of Bankruptcy Case ("Motion to Withdraw"); and,

b. Application of Committee of Unsecured Creditors to the District Court for Standing to Sue ("Application for Standing").

The averments of fact set forth in the Motion to Withdraw and the Application for Standing are incorporated herein by reference.

2. Litigation of the issues arising out of the Fraudulent Transaction and/or the Royal China Transfer will involve:

a. Complex substantive issues of bankruptcy law;

b. Sophisticated questions of civil procedure arising during the course of a complex civil matter;

c. Complex procedural issues under bankruptcy law;

d. Sophisticated, solvent, financially responsible Defendants, including Security Business Credit, Inc. and Coca Cola Bottling Company of New York, Inc.; and,

e. Claims in excess of $15,000,000 and the demand for a jury trial.

3. The Committee has already engaged the law firm of Campbell & Levine generally in this case, and the bankruptcy judge has approved such engagement.

4. As to the litigation and issues arising out of the Fraudulent Transaction, and the Royal China Transfer, the Committee believes that it is necessary to engage the services of legal counsel competent and experienced in bankruptcy and debtor/creditor matters, as well as legal counsel competent and experienced in complex civil litigation.

5. The Committee desires to engage its general legal counsel, Campbell & Levine, to pursue the litigation and issues arising out of the Fraudulent Transaction, and the Royal China Transfer, and all matters related thereto, insofar as such counsel is competent and experienced in bankruptcy and debtor/creditor matters.

6. The Committee also desires to engage the law firm of Mansmann, Cindrich & Huber, as special co-counsel, to assist in the pursuit of the litigation and issues arising out of the Fraudulent Transaction, and the Royal China Transfer, and all matters related thereto, insofar as such law firm is competent and experienced in complex civil litigation.

7. Campbell & Levine and Mansmann, Cindrich & Huber are prepared to undertake responsibility to pursue the litigation and issues arising out of the Fraudulent Transaction, and the Royal China Transfer, and all matters relating thereto, on the following basis regarding compensation:

a. A contingent fee of 33% of any and all funds recovered by them while pursuing the litigation and issues arising out of the Fraudulent Transaction and/or the Royal China Transfer;

b. Reimbursement of any and all out-of-pocket direct expenses and costs incurred by them while pursuing the litigation and issues arising out of the Fraudulent Transaction and/or The Royal China Transfer; but,

c. Subject to the provisions of 11 U.S.C. §328, that the Court may allow compensation on a different basis if such terms and conditions prove to have been improvident in light of developments not anticipated at the time of fixing such terms and conditions.

9. The Committee approves the engagement of counsel on such basis, and based upon the Declaration attached hereto, believes that such law firms and their members and associates do not hold or represent any interest adverse to the estate and that such law firms are disinterested persons within the meaning of 11 U.S.C. §101(13).

WHEREFORE, the Committee asks the Court to enter an Order approving its engagement of Campbell & Levine and Mansmann, Cindrich & Huber as its legal counsel on the foregoing basis, in order that they pursue the litigation and issues arising out of the Fraudulent Transaction and the Royal China Transfer and all matters related thereto.

THE COMMITTEE OF
UNSECURED CREDITORS
By: WILLIAM RIKER
William Riker, Chairman

*DECLARATION OF DOUGLAS A. CAMPBELL*

I, Douglas A. Campbell, declare:

1. I am an attorney duly admitted to practice before all Courts in the Commonwealth of Pennsylvania, as well as this Court, and the Court of Appeals for the Third Circuit.

2. I am a member of Campbell & Levine, the law firm that the Committee is seeking to employ the Application to which this Declaration is attached. All of the members and associates of this law firm are similarly duly admitted to practice in this state and before this Court.

3. The law firm of Campbell & Levine has extensive experience in Bankruptcy, insolvency corporate reorganization and debtor/creditor law. The firm is well qualified to represent the Committee herein, and is willing to accept employment on the basis set forth in the annexed application.

4. The law firm of Campbell & Levine, its members and its associates, do not hold any interest adverse to the above-entitled estate and said law firm is a disinterested person as defined in 11 U.S.C. §101(13).

I declare under penalty of perjury that the foregoing is true and correct.

Executed this 6th day of April, 1983, at Pitt., PA.

DOUGLAS A. CAMPBELL
Douglas A. Campbell
CAMPBELL & LEVINE
220 Grant Street
Pittsburgh, PA 15219-2198
(412) 261-0310

*DECLARATION OF ROBERT CINDRICH*

I, Robert Cindrich, declare:

1. I am an attorney duly admitted to practice before all Courts in the Commonwealth of Pennsylvania, as well as this Court, and the Court of Appeals for the Third Circuit.

2. I am a member of Mansmann, Cindrich, & Huber, the law firm that the Committee is seeking to employ the Application to which this Declaration is attached. All of the members and associates of this law firm are similarly duly admitted to practice in this state and before this Court.

3. The law firm of Mansmann, Cindrich & Huber has extensive experience in matters of complex civil litigation. The firm is well qualified to represent the Committee herein, and is willing to accept employment on the basis set forth in the annexed application.

4. The law firm of Mansmann, Cindrich, & Huber, its members and its associates, do not hold any interest adverse to the above-entitled estate and said law firm is a disinterested person as defined in 11 U.S.C. §101(13).

I declare under penalty of perjury that the foregoing is true and correct.

Executed this 6th day of April, 1983, at Pitt., PA.

ROBERT CINDRICH
Robert Cindrich
MANSMANN, CINDRICH & HUBER
Two Chatham Center
Pittsburgh, PA 15219

IN THE
UNITED STATES BANKRUPTCY COURT
For the Western District of Pennsylvania

---

Chapter 11
Case No. 82-3265

---

IN RE:
JEANNETTE CORPORATION t/a
JEANNETTE GLASS,

*Debtor.*

---

*ORDER*

AT PITTSBURGH, in said District, this 28th day of July, 1983, upon consideration of the foregoing Application of Committee of Unsecured Creditors to the District Court to Engage Co-Counsel, it is hereby Ordered, Adjudged & Decreed that the Committee of Unsecured Creditors be and hereby is granted leave to engage the law firms of Campbell & Levine and Mansmann, Cindrich & Huber as its legal counsel to pursue the litigation and issues arising out of the Royal China Transfer and the alleged Fraudulent Transfer referred to in said Application, on the following basis:

a. A contingent fee of 33% of any and all funds recovered by them while pursuing the litigation and issues arising out of the Fraudulent Transaction and/or the Royal China Transfer;

b. Reimbursement of any and all out-of-pocket direct expenses and costs incurred by them while pursuing the litigation and issues arising out of the Fraudulent Transaction and/or the Royal China Transfer; but,

c. Subject to the provisions of 11 U.S.C. §328, that the Court may allow compensation on a different basis if such terms and conditions prove to have been improvident in light of developments not anticipated at the time of fixing such terms and conditions.

GERALD K. GIBSON

IN THE
UNITED STATES BANKRUPTCY COURT
For the Western District of Pennsylvania

---

Case No. 82-3265

---

IN RE:

JEANNETTE CORPORATION t/a
JEANNETTE GLASS,

*Debtor.*

---

*CERTIFICATE OF MAILING*

I, Douglas A. Campbell, hereby certify as follows:

1. That at all times relevant hereto, I have been more than 18 years old;

2. That on the 6th day of April, 1983, I caused a true and correct copy of the attached to be hand-delivered to Sanford M. Lampl, Esquire, LAMPL, SABLE & MAKOROFF, at 710 Fifth Avenue, Pittsburgh, PA 15219, to be mailed, Federal Express to Alan Lepene, Esquire, THOMPSON, HINE & FLORY, at 1100 National City Bank Bldg., Cleveland, OH 44114.

DOUGLAS A. CAMPBELL
Douglas A. Campbell
CAMPBELL & LEVINE
220 Grant Street
Pittsburgh, PA 15219-2198
(412) 261-0310

## DOCUMENT I

**Motion of John Polojac, *et al.*, Filed on February 2, 1987 to Convert From Chapter Eleven to Chapter Seven of the Bankruptcy Code**

IN THE
UNITED STATES BANKRUPTCY COURT
For the Western District of Pennsylvania

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Filed 2-2-87
Docket #496
Bankruptcy No. 82-3265
Motion No. 87-531M

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IN RE:
JEANNETTE CORPORATION, t/a
JEANNETTE GLASS,

*Debtor,*

JOHN POLOJAC and AMERICAN FLINT
GLASS WORKERS UNION OF NORTH
AMERICA, LOCAL NO. 535,

*Movants,*

vs.

JEANNETTE CORPORATION, t/a
JEANNETTE GLASS,

*Respondent.*

---

*MOTION TO CONVERT CASE TO*
*A CHAPTER 7*

TO THE HONORABLE BERNARD MARKOVITZ, BANKRUPTCY JUDGE:

John Polojac (hereinafter "Polojac") and the American Flint Glass Workers Union of North America, Local No. 535 (hereinafter called "Union"), by their attorneys Philip E. Beard and Stonecipher, Cunningham, Beard & Schmitt, do hereby move this Court to convert the above case from a case under Chapter 11 of the Bankruptcy Code to a case under Chapter 7 of the Bankruptcy Code and in support thereof represent as follows:

1. Polojac is a former employee of the Debtor who has a claim against the Debtor that is listed on the Debtor's Schedules in the amount of $564.85. In addition, Polojac has other claims against the Debtor.

2. The Union is the duly constituted bargaining representative of the former employees of the Debtor including approximately 920 employees who were active employees at the time the case was filed and approximately 220 employees who were retired as of the filing of the case. All of the active and retired employees have claims against the Debtor.

3. This Chapter 11 case was filed on October 4, 1982.

4. The Debtor's operations were completely shut down shortly after the filing of the Chapter 11 and have not operated since. All of the Debtor's machinery, equipment and all other assets that would be required to operate the business have been sold. There is therefore no way that the Debtor could be reorganized and get back into operation.

5. All of the Debtor's assets have been converted to cash except for a cause of action which the Trustee is litigating in the United States District Court.

6. There is no possibility whatsoever of this Debtor being revived as an operating entity. There is continuing to be a loss and diminution of the estate and there is no likelihood at all of a rehabilitation of the Debtor.

7. There is no possibility that the Debtor will be able to effectuate a Plan.

8. There has been an unreasonable delay by the Debtor in the administration of this Chapter 11 that is prejudicial to the creditors.

9. If the case is converted to a Chapter 7, shortly after the expiration of the bar date that will be established pursuant to Bankruptcy Rules 1019 and 3002, the Trustee can make a partial distribution to creditors of virtually all of the cash presently on hand and then make a final distribution when the District Court litigation is concluded.

10. It is in the best interests of all creditors of the Debtor that the liquidation be completed and the distribution made in accordance with Chapter 7.

WHEREFORE, Movants request an Order converting this Chapter 11 case to a case under Chapter 7.

Dated: February 2, 1987

STONECIPHER, CUNNINGHAM,
BEARD & SCHMITT
By: PHILIP E. BEARD
Philip E. Beard, Counsel for
John Polojac and American
Flint Glass Workers Union
of North America, Local No. 535
125 First Avenue
Pittsburgh, PA 15222
(412) 391-8510

**DOCUMENT J**

**Motion of James Moody, Trustee, Filed with the District Court on January 6, 1988 to Extend the Claims Bar Date in Lieu of Conversion**

IN THE
UNITED STATES DISTRICT COURT
For the Western District of Pennsylvania

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Filed 1-6-88
Docket #406
C.A. No. 83-238
Bankruptcy No. 82-3265
Judge Simmons
(Related Matter: CA 83-2383)

---

IN RE:
JEANNETTE CORPORATION, t/a
JEANNETTE GLASS,

*Debtor.*

---

*MOTION TO EXTEND CLAIMS BAR DATE IN LIEU OF CONVERSION*

James Moody, Trustee, by his undersigned counsel, files the following Motion:

1. Pending before the Court in this Civil Action is a Motion to Convert Case to a Chapter 7, filed by the American Flint Glassworkers Union of North America, together with its Brief in Support of the same.

2. Memoranda or briefs in opposition to the Motion have been filed by the Debtor, the Committee of Unsecured Creditors, the Coca-Cola Bottling Company of New York, Inc., and Security Pacific Business Credit, Inc.

3. The Trustee believes that under the circumstances the Court, in its discretion, could properly convert this case to one under Chapter 7. This position is persuasively argued in the Brief which the American Flint Glassworkers Union of North America filed in support of its Motion to Convert case to Chapter 7.

4. However, given the unique circumstances of this case, the Trustee also believes that it is in the best interest of the Bankruptcy estate to allow this case to remain in Chapter 11.

5. As pointed out in the Memoranda and Briefs filed by the opponents of the Conversion Motion, the administrative advantages of processing this case under Chapter 11 of the Bankruptcy Code include:

a. Continued participation of the Committee of Unsecured Creditors and its counsel, both of whom would be statutorily terminated upon conversion of this case to Chapter 7;

b. The enhancement of the settlement possibilities in the case of *Moody v. Security Pacific, et al.* due to the plan provisions of Chapter 11 available to all parties in interest; and

c. The cost efficiency of maintaining the same fiduciaries in this case, including the Trustee, his attorneys, and his accountants.

6. At the same time, the Trustee takes the position that the administrative efficiency and benefits of keeping this case in Chapter 11 should not be realized at the expense of creditors whose so-called "late" Chapter 11 claims would become timely filed upon conversion of this case to Chapter 7.

7. Attached hereto as Exhibit "A" is a copy of the portion of the claims docket maintained by the Clerk of the Bankruptcy Court for this case, which identifies the holders and amounts of the so-called "late" Chapter 11 claims.

8. Bankruptcy Rule 3003(c)(3) provides that the Court "for cause shown may extend the time within which proofs of claim . . . may be filed."

9. The Trustee believes that cause exists for the Court to exercise its discretion to extend the claims bar date to the same extent it would have been extended had this case been converted to Chapter 7.

10. The extension would not be inequitable, nor would it unduly prejudice any party in interest.

11. The extension will favorably impact upon the administration of the estate.

12. In any case, pursuant to Bankruptcy Rule 3002(c)(4), the Court must set a new claims bar date with respect to claims arising from the Debtor's rejection of executory contracts during the course of this case.

13. Bankruptcy Rule 3002(c) provides that in a Chapter 7 case a proof of claim shall be filed within ninety (90) days.

WHEREFORE, the Trustee asks that, in lieu of converting this case to one under Chapter 7, the Court enter an order pursuant to Bankruptcy Rule 3003(c)(3) extending and fixing the bar date for this Chapter 11 case to such date as shall appear appropriate at the time of the hearing on this Motion.

CAMPBELL & LEVINE
By: DOUGLAS A. CAMPBELL
Douglas A. Campbell
3100 Grant Building
Pittsburgh, PA 15219
(412) 261-0310
*Attorneys for James Moody,*
*Trustee for Jeannette Corporation*

**DOCUMENT K**

**Second Answer of the Certiorari Petitioning United States District Judge to the Petitions for Mandamus Opposing the Issuance of the Writ of Mandamus**

UNITED STATES COURT OF APPEALS
For the Third Circuit

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No. 88-5249

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MOODY, et al.,

v.

PAUL A. SIMMONS, et al.

---

(Moody, et al. Security Pacific, et al.)
C.A. No. 83-2383; Jeannette Corporation
Bankruptcy No. 82-3265
(Western District of Pennsylvania)

---

*ANSWER*

The Second Answer and/or Response of Respondent Paul A. Simmons to PETITIONERS' PETITION FOR A WRIT OF MANDAMUS, pursuant to the Court of Appeals' Order dated May 9, 1988 in the above captioned case.

This Respondent, Paul A. Simmons, opposes the relief requested by the Petitioners in the above captioned case and respectfully submits the following reasons for this opposition as follows:

1. The Petitioners, who are exclusively the Chapter 11 Trustee and additionally who are the attorneys who represent said Trustee and the Committee of Unsecured Creditors in certain litigation, have petitioned your Honorable Court of Appeals for a Writ of Mandamus directed against this Respondent, in said Trustee and attorneys' personal names and interest purporting to be the real parties in interest therein; and this Petition for a Writ of Mandamus has *not* been filed by these Petitioners in a representative capacity for or on behalf of the Debtor and/or any of the Secured and/or Unsecured Creditors and/or for, or on behalf of any other interested party in this case.

2. The issue is whether or not your Honorable Court of Appeals can lawfully vacate a discretionary order of the United States District Court which converted a Bankruptcy Proceeding from Chapter 11 of the Bankruptcy Code to Chapter 7 of said Code, on the undisputed and uncontested relevant facts of this case. There are no genuine material disputed facts in this case.

3. This Respondent, as a United States Judge, has made findings of fact, conclusions of law and an Order of March 15, 1988, relating to the "conversion" issue and also has written an exhaustive opinion along with a relevant appendix in regard to the same. Additionally, this Respondent already has filed an answer to the subject Petition for a Writ of Mandamus, along with a relevant appendix opposing the granting of said Writ. All of these papers have been heretofore filed with the Circuit Clerk in the above captioned case and this Respondent does hereby incorporate the same papers by reference thereto and they are made a part of this Answer as though they were set out in full herein.

4. As a subsidiary issue, the Petitioners' make the specious and false claim that this Respondent Judge had recused himself from the Bankruptcy case and hence had no power to convert the Bankruptcy case from Chapter 11 to Chapter 7. The record shows, even beyond any reasonable doubt, that this Respondent Judge had not recused himself from this case at any relevant time and was fully empowered, at all relevant times to make the "Order of Conversion", heretofore mentioned. (See first Answer referred to and heretofore filed in this case).

5. Although all of the real parties in interest, Secured and Unsecured Creditors are fully represented, (even the classes with conflicting interests are represented), and have been fully advised as to this Respondent Judges' Court Order of March 15, 1988, not one of these genuinely interested parties have objected to and/or appealed from said Order of March 15, 1988. Further, none of the real parties in interest have joined in the prayer of the within Petition for a Writ of Mandamus, requesting your Honorable Court to vacate said "conversion order" of March 15, 1988. (See this Respondents papers heretofore filed and referred to in this case.)

6. The law is clear and settled that a Chapter 11 Trustee has no legally protected personal interest and/or fiduciary interest of any kind whatsoever, that would give him standing to even request and/or obtain from your Honorable Court an Order to vacate this Respondent's Court "Conversion" Order of March 15, 1988, via a Petition for a Writ of Mandamus. If the Trustee had a legally cognizable interest in the "Conversion" matter, his remedy would be by an appeal, not mandamus. Similarly, said attorneys who are filing this Petition for Writ of Mandamus in their personal, non-representative capacity, and who do not represent their clients in this Mandamus action, have no

protectable interest and have absolutely no personal standing and/or legally protected interest whatsoever to even request and/or obtain from your Honorable Court an Order to vacate this Respondent's Court "Conversion" Order of March 15, 1988. (See Respondent's papers, answer, etc. . . . heretofore filed in this case).

7. As heretofore noted in this Respondents Opinion and Answer to the Mandamus Petition, (hereinbefore incorporated in this answer by reference), it is ethically improper for all of these Petitioners to interfere in the Bankruptcy "Conversion" matter by way of this Petition in Mandamus, in order to protect their admitted personal financial interest in an "unlawful contingent fee order" and in obtaining a potential 12 million dollar legal fee. (See discussion in papers incorporated herein by reference). The real reason that the Petitioners wish your Honorable Court to vacate this Respondent's Court Order of March 15, 1988, is only because said Petitioner's (lawyers and trustee) are removed from the "fraudulent conveyance litigation", by operation of law when the case was converted to Chapter 7 and they must be reappointed by the United States Trustee in order to continue their fiduciary and legal representation.

8. The law is clear and settled, that the decision of this Respondent Judge to Convert the Bankruptcy case from Chapter 11 to Chapter 7, was clearly within this Respondent Judge's discretion and that the extra-ordinary remedy of mandamus will not ever lie to vacate and/or correct the exercise of this Respondent's judicial discretion, except where this Respondent Judge abuses his discretion as to a "conversion" issue. (See cases cited and discussion in the incorporated material).

9. Every single interested party to this Bankruptcy matter, even including each and every petitioner, unanimously have admitted on the record (see discussion

in incorporated papers) that this Respondent Judge *did not* abuse his discretion, when he Ordered the case converted from Chapter 11 to Chapter 7. In fact, this Respondent Judge set forth four separate and distinct reasons for converting this case from Chapter 11 to 7, and even the within Petitioners could find fault and/or error with only one of the four assigned reasons given by this Respondent Judge for converting said Bankruptcy to Chapter 7. (See discussion incorporated papers).

10. This Petition for a Writ of Mandamus, directed to your Honorable Court is a blatant effort to subvert the legal processes of your Honorable Court in order to protect the personal financial interests of the Petitioners in continuing on a case in the course of litigation (fraudulent conveyance litigation) and for the additional purpose of obtaining a potential 12 million dollar legal fee, and for no other good and sufficient lawful reason.

11. For your Honorable Court to grant the relief requested by these Petitioners would subvert and compromise the legal efficacy of the judicial process.

12. This Petition for Mandamus should be dismissed with costs on the Petitioners and they and all of said Petitioners should be barred from practicing Bankruptcy law in the Bankruptcy Courts and the District Courts of the Third Circuit for reasons heretofore set forth in the first Answer to this Petition for Writ of Mandamus, and which Answer is incorporated herein and made a part hereof by reference.

Respectfully submitted,

PAUL A. SIMMONS
Paul A. Simmons
Respondent

## DOCUMENT L

**The Answer of John Polojac, etc. Opposing the Issuance of the Writ of Mandamus**

IN THE UNITED STATES COURT OF APPEALS
For the Third Circuit

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No. 88-5249

---

JAMES MOODY, Trustee of the Estate of JEANNETTE CORPORATION, and THE COMMITTEE OF UNSECURED CREDITORS OF JEANNETTE CORPORATION,

and

ROBERT J. CINDRICH, Esquire, MANSMANN CINDRICH & TITUS, DOUGLAS A. CAMPBELL, Esquire, and CAMPBELL & LEVINE,

*Petitioners,*

vs.

THE HONORABLE PAUL A. SIMMONS, United States District Judge For The Western District Of Pennsylvania,

and

SECURITY PACIFIC BUSINESS CREDIT, INC., THE COCA COLA BOTTLING COMPANY OF NEW YORK, INC., KNY DEVELOPMENT CORPORATION, J. CORP., JOHN P. BROGAN, JOHN J. BROGAN, HANLEY DAWSON, JR., HANLEY DAWSON, III, JAMES R. WINOKER, ROBERT M. JANOWIAK, INTERDYNE, INC., MUENCH-KREUZER, CANDLE COMPANY, CALVIN McCRACKEN and FRANK W. STOREY,

and

JEANNETTE CORPORATION, t/a JEANNETTE GLASS, JOHN POLOJAC and AMERICAN FLINT GLASS WORKERS UNION OF NORTH AMERICA, LOCAL NO. 535,

*Respondents.*

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*TO*

*ANSWER OF RESPONDENTS, JOHN POLOJAC AND AMERICAN FLINT GLASS WORKERS UNION OF NORTH AMERICA, LOCAL NO. 535, TO THE PETITION FOR A WRIT OF MANDAMUS FILED BY TRUSTEE AND THE COMMITTEE OF UNSECURED CREDITORS OF JEANNETTE CORPORATION, ROBERT J. CINDRICH, ESQUIRE, DOUGLAS CAMPBELL, ESQUIRE, THE LAW FIRM OF CAMPBELL & LEVINE AND THE LAW FIRM OF MANSMANN, CINDRICH & TITUS.*


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## *I. INTRODUCTION*

The Jeannette Corporation t/a Jeannette Glass (hereinafter "Jeannette") bankruptcy case should and must be converted from a Chapter 11 Reorganization to a Chapter 7 Liquidation. The limited purpose of the answer of John Polojac and American Flint Glass Workers Union of North America, Local No. 535 (hereinafter "Union") will be to demonstrate to this Honorable Court of Appeals that the undisputed facts clearly mandate that the Order converting this case to a Chapter 7 be upheld and thus procedurally permit this case to finally go forward.

Unfortunately for the parties of interest, conflicts have arisen between the Honorable Judge Paul A. Simmons and those conflicts have steadily grown in intensity. We are concerned that those conflicts will receive so much of the Court's attention that the real and primary issue in this case, which is conversion to a Chapter 7, will be overlooked. Without an immediate conversion, this case will remain stuck in the legal dead lock which has already lasted approximately six years.

The Union contends that if ever there was a case ripe for conversion, this is it. Therefore, the Union adopts the Answer of the Honorable Paul A. Simmons to the extent

that the Answer discusses the issue of conversion; however, to assure that the primary issue of conversion is returned to focus and properly and promptly adjudicated, the Union will not address the other issues discussed in the Judge Simmons' Answer.

The Union desires this Honorable Court to uphold Judge Simmons' Order converting this case to a Chapter 7. Judicial economy, the rights of the creditors, and the undisputed facts of this case demand it. In the alternative, the Union requests that should the Order be vacated, the Honorable Appellate Court specifically state that by vacating the conversion order, the Court does not hold that the conversion was improper, but merely that Judge Simmons was not in a position to make any ruling whatsoever regarding the conversion issue and that the new District Judge or the Bankruptcy Court, as the case may be, may decide the matter fresh and on its merits.

## *II. FACTS AND LAW RELEVANT TO CONVERSION*

This case originated upon the filing of an involuntary Chapter 7 petition, on *October 4, 1982,* by certain creditors of Jeannette. On December 9, 1982, the United States Bankruptcy Court for the Western District of Pennsylvania entered an Order converting the case from Chapter 7 to Chapter 11. Jeannette's operations were completely shut down shortly after the filing of the Chapter 11 and have not operated since. All of Jeannette's land, building, machinery, equipment, and all other assets that would be required to operate the business were sold in September of 1983. As of that date all the debtor's assets were converted to cash with the exception of a cause of action which the Trustee has filed against Security Pacific Business Credit, Inc., et al., at

Civil Action No. 83-2383 alleging a fraudulent conveyance. Since that time the only activity in the case has been the pursuit of that cause of action. Since that time Jeannette has had no place of business, employees, payroll, telephone, work orders, future business, economic inventory, inventory, machinery or equipment or any other tangible assets of any kind. In order for Jeannette to get back into operations it would have to start from scratch in acquiring facilities from which to operate.

The docket of the case indicates that a bar date of October 31, 1983 was established and notice thereof was sent out by the Bankruptcy Clerk's office on April 29, 1983.

Jeannette's Schedules indicate that it has 882 pre-petition unsecured trade creditors whose claims total $4,174,224.00. Jeannette also scheduled 732 Active Employees for vacation pay in the amount of $581,037.00. Proof of Claim No. 640 filed by the Union on behalf of the 732 Active Employees in the total amount of $14,658,870.20 reflects total vacation pay claims of $675,669.82 of which $169,241.53 constitute priority claims and the remaining $506,482.29 represent non-priority unsecured claims.

A Motion to Convert this case back to a Chapter 7 was filed by the Union in the United States Bankruptcy Court and was withdrawn to the United States District Court for the Western District of Pennsylvania on March 10, 1987.

*II (a). DISCUSSION RELATING TO CONVERSION*

11 U.S.C. §1112(b) outlines what elements a party in interest must establish in order to convert a Chapter 11 reorganization to a Chapter 7 liquidation, which relevant sections read as follows:

(b) Except as provided in subsection (c) of this section, on request of a party in interest or the United States Trustee, and after notice and hearing, the Court may convert a case under this Chapter to a case under Chapter 7 of this Title or may dismiss a case under this Chapter, whichever is in the best interest of the creditors and of the estate, for cause, including

(1) Continuing loss to or diminution of the estate and absence of a reasonable likelihood of rehabilitation;

(2) Inability to effectuate a plan;

(3) Unreasonable delay by the debtor that is prejudicial to the creditors;

Different Courts have used either one, two, or all three of the above listed subsections of 11 U.S.C. 1112(b) to convert or dismiss a Chapter 11 debtor which has no ongoing business or assets.

*II (b). 11 U.S.C. §1112(b)(1) ANALYZED AND APPLIED TO JEANNETTE*

The first grounds for conversion to be briefly examined, considering the economic and physical condition of Jeannette, is §1112(b)(1) which requires a showing of "continuing loss to or diminution of the estate and absense of a reasonable likelihood of rehabilitation." This section requires a showing that two separate factors exist in the Chapter 11 Bankruptcy before the court will convert or dismiss it.

*II (b)(1). PRONG ONE OF 11 U.S.C. 1112(b)(1)*

The first prong of §1112(b)(1) requires a showing of a continuing loss to the estate or a diminution of the estate. A showing of either will satisfy the first requirement of this section.

A moving party can establish a diminution of an estate if a substantial loss of assets can be shown from the bankruptcy filing date until the hearing on the Motion to Convert. *In re D & F Meat Corporation*, 68 B.R. 39 (Bkrtcy. S.D.N.Y. 1986).

Jeannette's economic assets from the date of the bankruptcy filing until the present time displays a substantial diminution of the estate. When the petition was filed, Jeannette possessed an entire glassmaking facility, including the equipment necessary for manufacturing. At that time, Jeannette also had approximately 850 employees on its active payroll, plus various work orders and inventory on hand. Now, as previously stated, Jeannette has none of these hard assets. These facts reveal a diminution of Jeannette's estate.

A showing of a continuing loss to the estate will also satisfy the first prong of §1112(b)(1). *In the matter of W. J. Rewoldt Company*, 22 B.R. 459 (Bkrtcy. E.D. Mich. 1982). In this case debtor had no future business prospects or accounts receivable that were collectible and that debtor was actually in the process of a liquidation. The court stated, "Rewoldt's intent to liquidate, coupled with its failure to obtain new business, indicates a perspective continuing loss." In the matter at hand, Jeannette has absolutely no new business or new business prospects and could not fulfill a manufacturing contract if one should become available. Jeannette is also in the liquidation process. These factors alone are sufficient to qualify as a continuing loss under §1112(b)(1).

A lack of assets or equity will also meet the burden of showing that there is continuing loss. *In re Tracey Service Company, Inc.*, 17 B.R. 405 (Bkrtcy. E.D. Pa.

1982). In *Tracey,* the debtor had virtually no assets. The economic composition of *Tracey* parallels Jeannette. Jeannette, like *Tracey,* has no operating business, employees, or current income. Neither party owned any equipment or inventory. The *Tracey* Court held that there was a continuing loss to the estate given the facts involved.

*II (b)(2). PRONG TWO OF 11 U.S.C. 1112(b)(1)*

Once it is shown that the first prong of §1112(b)(1) is satisfied then the moving party must demonstrate that "an absence of a reasonable likelihood of rehabilitation" exists.

Courts have examined and relied upon various factors in determining whether a debtor has a reasonable likelihood of rehabilitation. The primary factors considered are the debtor's present assets and the status of his current business operations.

Many courts have held that the absence of a reasonable likelihood of rehabilitation requirement is satisfied if the moving party can show that the debtor is without assets and an ongoing business. Without a reasonable amount of assets and a feasibly operating business there is no logic in continuing a Chapter 11. *In re 312 West Ninety-First Street Company, Inc.,* 35 B.R. 346 (Bkrtcy. S.D.N.Y. 1983), *In the matter of WPAS, Inc.,* 6 B.R. 44 (Bkrtcy. M.D. Fla. 1980), *New Jersey Bank, N.A., v. Oakland Shopping Plaza,* 25 B.R. 311 (Bkrtcy. D.N.J. 1982). Absence of an economic entity reflects both upon "the reasonable likelihood of rehabilitation" and the "inability to effectuate a plan." *In re Imperial Heights Apartments, Ltd.,* 18 B.R. 858 (Bkrtcy. S.D. Oh. 1982). The debtor with no unencumbered assets which might serve as collateral for

refinancing and potential for cash flow has no reasonable likelihood of reorganization. *In re Paccar Financial Corp., v. Pappas,* 17 B.R. 662 (Bkrtcy. D. Mass. 1982).

A debtor must have a viable business in place in order to have any potential of rehabilitation. *In re Golden Acala Partnership,* 50 B.R. 552 (Bkrtcy. M.D. Fla. 1985).

Debtors which argue that an "ongoing business" is not required under Chapter 11 meet with little success. *In the matter of Winshall Settlor's Trust,* 758 F.2d 1136 (6th Cir. 1985).

Jeannette is not operating an ongoing business nor does it possess any assets to use in business or serve as collateral for refinancing. The complete absence of economic activity is evidence that no reasonable likelihood of rehabilitation exists. Since Jeannette has no viable business, or potential viable business, to protect or rehabilitate, their reason for remaining in Chapter 11 has evaporated.

In interpretting this section, courts have stressed that rehabilitation does not equal reorganization. *In re Ledges Apartments,* 58 B.R. 84 (Bkrtcy. D. Vt. 1986).

Rehabilitation, under this section, has thus been defined to mean more than mere liquidation under a Chapter 11 proceeding, even though liquidation may constitute a permissible plan of reorganization under 11 U.S.C. §1123(b)(4). *In the matter of E. Paul Covacs and Company, Inc.,* 16 B.R. 203 (Bkrtcy. D. Ct. 1981). *In re Tolco Properties, Inc.,* 6 B.R. 482 (Bkrtcy. E.D. Va. 1980).

It is difficult to comprehend Jeannette being rehabilitated and put back in good sound position and re-established on a firm basis. It would probably be more efficient to build an entirely new glassmaking facility

than try to rebuild one with what remains of Jeannette. Jeannette has no reasonable likelihood of rehabilitation (as defined by case law interpreting this section) and thus does not qualify to remain in Chapter 11.

### *II (b)(3). JEANNETTE'S CAUSE OF ACTION AS ASSET OF THE ESTATE UNDER 11 U.S.C. §1101*

Jeannette may claim that although they do not own a viable ongoing business, they do possess a fraudulent conveyance action which, in their opinion, may provide at some point in the future significant assets to the estate which can then be distributed to the creditors. This scenario (no asset debtor excepting for questionable cause of action) is not uncommon to the Bankruptcy Courts. As just noted in the *Golden* case, where debtor had no assets of any kind excepting a cause of action regarding a land transfer, the court held that debtor had no reason being in Chapter 11 regardless of the potential cause of action, for there was no viable business worthy of protection and rehabilitation. *Golden,* supra, at 557.

In general, courts look to what capital and other actual assets a debtor possesses which can be used in his plan of reorganization; however, potential recovery from a law suit is insufficient to create a reasonable likelihood of rehabilitation. *Imperial Heights,* supra, at 858. Since there is no way to establish the feasibility of a plan which is to be funded solely from the possibility of a law suit, Bankruptcy Courts will convert or dismiss such Chapter 11 bankruptcy cases. *In the matter of Winshall Settlor's Trust,* 758 F.2d 1136 (6th Cir. 1985). Some courts have stated that a mere potential law suit is insufficient to even invoke Chapter 11 jurisdiction if the debtor has no "business" to reorganize. *In re 312 West 91st Street Company,* supra, at 346.

Jeannette is similar to the above cases in that it has no ongoing business, tangible assets, or potential for rehabilitation. As noted, Chapter 11 plans can not be funded on potential recovery from future law suits. This is particularly so in this case where the former principals of the Debtor are defendants in the fraudulent conveyance action brought by the Trustee. It is ridiculous to contemplate that after the litigation is completed by judgment or settlement that the principals will then reorganize the Debtor into an operating entity. The conclusion of this Chapter 11 case will be a liquidation. There is just no other possibility. Bankruptcy courts have consistently held that this type of debtor should not be in a Chapter 11 bankruptcy.

*II (c). 11 U.S.C. §1112(b)(2) ANALYZED AND APPLIED TO JEANNETTE*

The second grounds for conversion to be explored, considering the Jeannette factual situation, is §1112(b)(2) which requires a showing that the debtor lacks the ability to formulate or carry out a plan. Moving parties can convert a Chapter 11 debtor using this Section upon a showing that the debtor has no assets and is not an ongoing, viable business. *In re Tracey*, supra, at 409.

Bankruptcy Courts will use this section to convert or dismiss a Chapter 11 debtor where it is shown that the debtor is little more than a corporate shell lacking a place of business, employees, payroll, or discernible economic activity. *In re Lamar Estates, Inc.*, 6 B.R. 933 (Bkrtcy. E.D.N.Y. 1980), *In re Economy Cab and Tool Company, Inc.*, 44 B.R. 721 (Bkrtcy. D. Minn. 1984).

A most detailed analysis of this section is found in *Clarkson v. Cooke Sales and Service Company*, 767 F.2d 417 (8th Cir. 1980). This court reasoned that if the debtor

could not submit a feasible plan then they did not have the ability to effectuate a plan. The *Clarkson* Court held:

> Although we sympathize with the Clarsons, we find that the feasibility test is firmly rooted and predictions based on objective fact. The Second Circuit has declared that the feasibility test contemplates "the probability of actual performance of the provisions of the plan. Sincerity, honesty, and willingness are not sufficient to make the plan feasible, and neither are any visionary promises. The test is whether the things which are to be done after confirmation can be done as a practical matter under the facts." (In re *Bergman*, 585 F.2d 1171 (2d Cir. 1978)). Pertinent factors to be considered include the businesses earning power, the sufficiency of the capital structure, economic conditions, managerial efficiency, and whether the same management will continue to operate the company.

*Clarkson* at 420.

It is difficult to imagine how Jeannette is going to submit or effectuate a viable plan of reorganization. Because the Debtor has no "business" to reorganize and is nothing more than a mere "corporate shell," courts consistently hold that such facts constitute an inability to effectuate a plan. Conversion or dismissal is proper under this Section.

It is further submitted that Jeannette's attitude in asserting the bar date against the claims of the Active Employees and the Retirees will make it impossible for any plan of reorganization to be confirmed. Under Bankruptcy Code §1111(a), all scheduled claims are deemed filed and are therefore allowed under Bankruptcy Code §502. All allowed unsecured claims have the right to vote on a Plan of Reorganization pursuant to

Bankruptcy Code §1126(a). Also under Bankruptcy Code §1126(c) in order for a Plan of Reorganization to be accepted by a class of creditors at least two-thirds in dollar amount and more than one-half in number of the allowed claims in that class must vote to accept the Plan. Since the 732 Active Employees listed on Claim No. 640 are listed on Jeannette's Schedules and a portion of their claims are non-priority unsecured claims, there is no question that they all would have the right to vote on any Plan of Reorganization. The 206 Retirees included on Claim No. 639 were not listed on Jeannette's Schedules and had no notice of the bar date. If that issue becomes important in this case, there is no question that this Court would have to hold that the claims of the 206 Retirees must be allowed and are unaffected by the October 31, 1983 bar date and are therefore entitled to vote on any Plan of Reorganization. As the Supreme Court of the United States stated in *Mullhane v. Central Hanover Trust Company,* 339 U.S. 306 (1950):

> "An elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all the circumstances, to appraise interested parties of the pendance of the action and afford them an opportunity to present their objections."

*Mullane v. Central Hanover Trust Company* at Page 314.

There is no question that the requirements of due process apply to bankruptcy reorganization proceedings. *New York v. New York, New Haven, and Hartford Railroad Company,* 344 U.S. 293 (1953).

There are approximately 1,820 unsecured non-priority claims in this case consisting of 882 trade creditors and 938 Active and Retired Employees. In order for Jeannette to obtain confirmation of any plan, more than

fifty percent (50%) in number of claimants and more than two-thirds in dollar amount must vote in favor of the Plan. This would be impossible from a mathematical standpoint, if all or nearly all of the Active and the Retired Employees vote against the Plan. It doesn't take much imagination to conclude that a Plan which disenfranchises the Active and Retired Employees will not be met with their favor and will be defeated. If no plan can be confirmed, the only alternative is conversion of the case to a Chapter 7, Bankruptcy Code §1112(b)(2) and (5).

*II (d). 11 U.S.C. §1112(b)(3) ANALYZED AND APPLIED TO JEANNETTE*

The final of the enumerated causes to be examined that is applicable to Jeannette's situation is §1112(b)(3) which states that a case may be converted or dismissed if the moving party shows an unreasonable delay by the debtor that is prejudicial to creditors.

Courts will often combine §1112(b)(2) and (3) and hold that the debtor made an unreasonable delay that is prejudicial to the creditors because the debtor did not or cannot effectuate a plan within a certain time period. *In re Koerner v. Colonial Bank,* 800 F.2d 1358, (5th Cir. 1986). *In re Galvin,* 49 B.R. 665 (Bkrtcy. D.N.D. 1985).

In *Koerner,* the court converted a reorganization proceeding to a straight bankruptcy because of the debtor's inability to effectuate a plan and the debtor's unreasonable delay which was prejudicial to its creditors. The court specifically noted that it had given the debtor every opportunity to submit a feasible plan over a 16 month period.

The purpose of this section is outlined in *Hansen v. Tiana Queen Motel, Inc.,* 749 F.2d 146 (2d Cir. 1984). Here the court specifically refrained from fixing a certain

amount of time to be allowed a debtor. However they felt that in this particular matter, where 15 months have elapsed from the filing of the Chapter 11 petitions, too much time had elapsed and it was within their discretion to convert the case.

On October 4, 1982, an involuntary petition under Chapter 7 was filed by certain creditors of Jeannette. On its own Motion, Jeannette, converted the case to a Chapter 11 on December 23, 1982. Since this time (almost six years) no confirmable plan of reorganization has been submitted to the bankruptcy court, and as previously explained, no confirmable plan can ever be submitted (which alienates the employees). It is clear that no possibility of rehabilitation or reorganization exists for Jeannette. A delay of approximately six years from the Chapter 11 filing with no potential affirmable plan in sight constitutes an unreasonable delay by Jeannette which is prejudicial to the creditors. As noted, Chapter 11 is not a permanent cloak of protection and once the purpose of Chapter 11 is no longer a potential possibility, the case should be converted or dismissed.

### *II (e). OUTLINE OF OTHER CAUSES FOR CONVERSION OR DISMISSAL UNDER 11 U.S.C. §1112(b)*

It is important to note that Bankruptcy Courts are not confined to pigeon holing their particular set of circumstances into one of the defined "causes" listed in subsection (b) of §1112 whenever they desire to convert or dismiss a case filed under Chapter 11. A careful reading of the final phrase of subsection (b) reveals that "cause" include, but not necessarily limited to, the thereafter enumerated circumstances. Congress has made it clear that the list of what constitutes cause under §1112(b) is not exclusive. The House Reporters description of this section states:

> Subsection (b) gives wide discretion to the court to make an appropriate disposition of the case when a party in interest requests. The court is permitted to convert a reorganization case to a liquidation case or to dismiss the case, whichever is in the best interest of the creditors and the estate, only for cause . . . The list of [nine conditions] is not exhaustive. The court will be able to consider other factors as they arise, and use its equitable powers to reach an appropriate result in individual cases. H.R. Rep. Cong. and Admin. News 1987, Page 5781, 6361, 6362.

Recent bankruptcy opinions have indicated a willingness on the part of the judges to use their judicial discretion and equitable powers in expanding the definition of exactly what constitutes "cause" for which a Chapter 11 bankruptcy may be converted or dismissed. Lack of good faith in filing and maintaining a Chapter 11 bankruptcy, failing to prosecute a case, and lack of intent to reorganize are additional causes for which a Chapter 11 bankruptcy may be converted or dismissed. These additional "causes" will be examined in the light of the Jeannette bankruptcy.

### *II (e)(1). GOOD FAITH REQUIREMENT OF 11 U.S.C. §1112(b) ANALYZED AND APPLIED TO JEANNETTE*

The first general area of judge made law which may be used to convert or dismiss a Chapter 11 case is "lack of good faith" by the debtor in filing and maintaining his Chapter 11 bankruptcy. Although bad faith is not a specific ground for dismissal or conversion under §1112(b), the legislative history of this section leaves no doubt that the Court may consider whatever factors it

deems relevant in deciding the case. *In the Matter of Mogul,* 17 B.R. 680 (Bkrtcy. M.D. Fla. 1982). Elaborating on this point, the *Mogul* Court held:

> There is nothing in the legislative history which would indicate that Congress, by omitting the express requirement of "good faith" intended to do away with the safeguard against abuse and misuse of the process, a safeguard which has long been established and accepted as part of the bankruptcy philosophy for almost a century. Accordingly, good faith must be viewed as an implied prerequisite for the debtor's ability of obtaining relief under this Chapter [11].

*Mogul* at 682.

If the debtor is not a viable economic entity and it is clear that the petition was filed for the purpose of delaying and frustrating the legitimate efforts of secured creditors, courts will almost always find that there is lack of good faith which warrants conversion or dismissal. *In re Asbridge,* 61 B.R. 97 (Bkrtcy. D.N.D. 1986). In *Mogul,* supra, at 681. *In the Matter of Wellwood Corp.,* 60 B.R. 319 (Bkrtcy. M.D. Fla. 1986). *In re Albany Partners, Ltd. v. W. P. Westbrooke, Jr. et al.,* 749 F.2d 670 (11th Cir. 1984).

Other courts have held that good faith requires an intent to reorganize accompanied by a reasonable possibility of success. *In the matter of W. J. Rewoldt Company,* supra, 459. The Court in *Rewoldt* stated that the special remedy intended for reorganizations in Chapter 11 is misused when a debtor files such a reorganization seeking only an "overly luxurious administrative vehicle" to achieve a liquidation more expediously accomplished in Chapter 7. *In re Rewoldt* at 462. In Jeannette, the debtor has no reasonable

likelihood of reorganization and is actually and purposely in the process of liquidation. Remaining in Chapter 11 represents a lack of good faith on the part of Jeannette.

Some courts, in determining whether a Chapter 11 petition has been filed in good faith, examined whether the debtor has any assets, whether the debtor has an ongoing business to reorganize, and whether the debtor has a reasonable probability of having a plan proposed and confirmed. *In re Winshall Settlor's,* supra, at 1136.

Other courts, in determining lack of good faith of a no asset debtor with no ongoing business, emphasize the intent to abuse the judicial process rather than the delay to creditors. *In re Eden Associates,* 13 B.R. 578 (Bkrtcy. S.D.N.Y. 1981). Good faith is "merged into the power of the court to protect its judicial integrity from schemes of improper petitioners seeking to circumvent judicial process absent any economic reality. *In the matter of Northwest Recreational Activities, Inc.,* 4 B.R. 36 (Bkrtcy. N.D. Ga. 1980). *In the matter of Southern Communities, Inc.,* 57 B.R. 215 (Bkrtcy. M.D. Fla. 1986). The court in *Southern* stated:

> No single factor is determinative of the issue of lack of good faith of a debtor seeking relief under Chapter 11, the court will consider all facets and circumstances of the case. In finding lack of good faith, courts have focused on the intention of the debtor and emphasized intent to abuse the judicial process, i.e. filing for purposes not intended by the provisions of Chapter 11. This is especially true where it is evident at the outset that the debtor is not a viable economic entity and has no realistic possibility of an effective reorganization and it is obvious that the petition was filed for the sole purpose to frustrate and to delay the legitimate efforts of secured creditors to enforce their rights.

*Community* at 218.

One court found a general lack of good faith sufficient cause for conversion. *Paccar Financial Corp. v. Pappas,* supra, at 662.

It would appear that Jeannette lacks good faith in maintaining their Chapter 11 bankruptcy and is abusing the judicial process by not converting to a Chapter 7. The fact that Jeannette has no business or tangible assets to reorganize, has no potential for rehabilitation or probability of having a plan confirmed, and is delaying creditors from pursuing their legitimate claims are more the sufficient reasons to grant the conversion on the general grounds of lack of good faith and abuse of judicial process.

### *II (e)(2). FAILURE TO PROSECUTE CASE REQUIREMENT UNDER §1112(b) ANALYZED AND APPLIED TO JEANNETTE*

Some Bankruptcy Courts have held that the failure to prosecute a Chapter 11 case in an expeditious manner is "cause" to dismiss or convert the case. *In re Bacon,* 52 B.R. 52 (Bkrtcy. N.D. Iowa 1985). In this case, the court found that the failure to prosecute the Chapter 11 case in an expeditious manner was "cause" because a Chapter 11 debtor is a fiduciary of his creditors and is obligated to prosecute his bankruptcy proceedings in an expeditious manner. See *in re J. VanBrunt,* 46 B.R. 29 (Bkrtcy. W.D. Wis. 1984). If the court believes that the debtor-in-possession is oblivious to his fiduciary responsibilities imposed upon him in dealing with the property of the estate, conversion will be justified. *In re E. Paul Covacs and Company, Inc.,* supra, at 203.

Jeannette has had approximately six years in which to have a plan of reorganization confirmed. It would appear that they are oblivious to the responsibilities opposed upon them as fiduciaries of their creditors and that their handling of the "reorganization" has been less than expeditious. These facts alone would justify conversion under §1112(b).

*II(e)(3). INTENT TO REORGANIZE REQUIREMENT OF §1112(b) ANALYZED AND APPLIED TO JEANNETTE*

If a debtor files a Chapter 11 bankruptcy with the sole intention of liquidation, then the court may hold that sufficient cause exists for conversion. Liquidation is generally not the proper function of reorganization proceedings, but the function of ordinary bankruptcy proceedings. *In the matter of Maplewood Poultry Company,* 2 B.R. 545 (D. Maine 1980). Insolvent debtors should not control their business under the protection of a reorganization court beyond the point at which reorganization no longer remains realistic, unless liquidation would proceed more expeditiously and less expensively under the control of the debtor. *Maplewood,* supra, at 549. Therefore, if the court feels that a qualified and experienced Trustee could liquidate the case in a more efficient manner than the debtor in possession, the case will be converted. As a general rule, bankruptcy courts prefer to put the liquidation of an estate into the hands of experienced fiduciaries whose performance in the past merits the courts' confidence. *Maplewood,* supra, at 550.

## *II. (f) CONCLUSION OF CONVERSION DISCUSSION*

If there ever was a Chapter 11 case that should be converted, this is it. Jeannette has not operated for six years, has no assets to operate with and no hope whatsoever of reorganizing. There has been a continuing loss of the estate and there is no reasonable likelihood of rehabilitation, Jeannette cannot effectuate a Plan and there has been unreasonable delay by Jeannette that is prejudicial to the creditors. Under the circumstances it is submitted that this Honorable Appellate Court has no alternative but to, at a minimum, uphold Judge Simmons' Order converting this case to a case under a Chapter 7 of the Bankruptcy Code.

## *III. WRIT OF MANDAMUS ANALYSIS*

Without straying too far from the essential issue of conversion, it is the Union's position that the Respondents' Writ of Mandamus and Prohibition is unsupported by statutory or case law.

The facts clearly indicate that Judge Simmons did not recuse himself from this case until filing the Order of Court in the United States District Court for the Western District of Pennsylvania on March 30, 1988, which states that the Judge does hereby recuse himself. Judge Simmons did not orally recuse himself at the January 29 hearing, although he did announce his intention to recuse himself from this case at some time in the future. It is important to note that Judge Simmons issued his Findings of Fact, Conclusions of Law, and Order and Opinion regarding the Union's Motion for Conversion before recusing himself from the case. These facts are uncontested by Judge Simmons and by the Petitioners.

No statutory authority could be located which determines whether a judge's order that was entered after an oral announcement that a future recusal is intended is valid; therefore, case law must be reviewed.

Case law is very clear in holding that judicial acts taken *before* a Motion to Recuse is filed by a Movant may not later be set aside unless the Movant shows actual impropriety or actual prejudice; mere appearance of impropriety is not enough to overturn or disqualify the prior acts or orders entered by the judge. *United States v. Murphy,* 769 F.2d 1518, (7th Cir. 1985); *Falconer v. Meehan,* 804 F.2d 72, (7th Cir. 1986). Because Respondents never filed a Motion requesting Judge Simmons to recuse himself from this case, an actual showing of impropriety or actual prejudice is required in order to defeat the Order granting conversion.

Respondents' Writ of Mandamus and Prohibition and Respondents' Supplemental and Modified Writ of Mandamus do not contend in any way that the conversion Order was an improper, prejudicial, or unmerited Order. Nor do these Writs attack or even disagree with three of the four separate and distinct reasons found in Judge Simmons' opinion converting the case.

Judge Simmons' opinion outlines in detail four separate and distinct reasons why this case should be converted to a Chapter 7, with each reason being separately sufficient to require conversion. A summation of these reasons is as follows:

Reason 1: The undisputed facts demonstrate that there has been a continued and severe loss and diminution of the Debtor's assets; and since it is undisputed that there is absolutely no likelihood at all that said Debtor will be rehabilitated into a going concern, the proceeding must be converted to a Chapter 7.

Reason 2: The undisputed facts show that the reorganization plan formulated by the Trustee can never be effectuated because of the Trustee's inability to identify the unsecured creditors who are eligible to vote on the plan, and because of the present inability of the Trustee to assign a dollar value to the great majority of the claims, the proceeding must be converted to a Chapter 7.

Reason 3: The undisputed facts indicate that the completion of the fraudulent conveyance litigation will be delayed for several years, since there can be no vote on a plan of reorganization until the Trustee is able to identify the creditors who are eligible to vote on the plan, and until the Trustee is able to assign a dollar value to said creditors' claims, and hence, there will be an inordinate delay in bringing this bankruptcy proceeding under Chapter 11 to an end; and further, since it is admitted by all parties that the Debtor's assets must be liquidated in any event, it is clear that the proceeding must be converted to a Chapter 7.

Reason 4: The undisputed facts demonstrate that the Trustee and the attorney for the Trustee have maintained this Chapter 11 proceeding for personal and financial gain, and because there is admittedly no present intention of any kind by anybody to reorganize this Debtor, and because the Chapter 11 proceeding is being maintained in bad faith, the case must be converted to Chapter 7.

The Petitioners do not dispute or attempt to dispute Judge Simmons' first three reasons for converting this case, but do dispute Reason 4. Whether Reason 4 is right, wrong or indifferent is immaterial, because any of the first three Reasons are sufficient to support the conversion of this case to a Chapter 7 case.

## IV. *CONCLUSION*

The undisputed facts require that this case be converted to a Chapter 7 and that Judge Simmons' Order, at least to the extent it converts this case to a Chapter 7 case, be upheld. The Petitioners do not dispute that there is more than sufficient cause to convert this case, but only that Judge Simmons should not have entered any orders, regarding this case, after his announcement of his intention to recuse himself. Case law clearly indicates that in order to vacate judicial acts which occur before the filing of a Motion to Recuse, Movants must show that actual impropriety or actual prejudice occurred; mere appearance of prejudice or impropriety is not enough. Because Petitioners have yet to file a Motion to Recuse, and because Petitioners have not demonstrated the existence of actual impropriety or actual prejudice as to the four specific and distinct reasons for conversion outlined in Judge Simmons' opinion, the Writ of Mandamus and Prohibition must fail.

WHEREFORE, the Union requests an Order affirming the Order of the Honorable Paul A. Simmons converting the Jeannette Corporation Bankruptcy from a Chapter 11 to a Chapter 7. In the alternative, should the Court vacate the conversion Order, the Union requests that the ruling specify that the vacation of the Order is for reasons other than that of the merits of this case and that the new District Judge or Bankruptcy Court Judge, as the case may be, be directed to either convert the case or decide the matter fresh and on its merits, based on the same facts and law as relied upon by Judge Simmons.

DATED: May 16, 1988

Respectfully submitted,

STONECIPHER, CUNNINGHAM, BEARD
& SCHMITT
PHILIP E. BEARD
Philip E. Beard, Esquire
WILLIAM T. MOLCZAN
William T. Molczan, Esquire
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## DOCUMENT M

**Excerpts From a Slip Opinion (Not Yet Published) in the Case of *Polaroid Corporation v. Roy E. Disney, et al.*, United States Court of Appeals for the Third Circuit, Slip Opinion No. 88-3676, Filed November 23, 1988**

RECEIVED
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UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

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No. 88-3676

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POLAROID CORPORATION,

v. *Appellant*

ROY E. DISNEY
PATRICIA A. DISNEY
STANLEY P. GOLD
SHAMROCK HOLDINGS, INC.
SHAMROCK HOLDINGS OF CALIFORNIA, INC.
SHAMROCK CAPITAL INVESTORS III, INC
EMERALD ISLE ASSOCIATES, L.P.
SHAMROCK ACQUISITION III, INC.,

*Appellees*

---

On Appeal from the District of Delaware
(D.C. Civil No. 88-00525)

---

Argued October 27, 1988

Before: BECKER, HUTCHINSON and COWEN,
*Circuit Judges*

(Filed November 23, 1988)

PAUL C. SAUNDERS (Argued)
Cravath, Swain & Moore
One Chase Manhattan Plaza
New York, NY 10005

Rule. We therefore conclude that the All Holders Rule creates a private right of action *for shareholders*. There is no evidence, however, that it creates a private right of action for the target corporation. We must therefore address the question whether a target company nonetheless has standing to sue for violation of the Rule.

* 5. *Does a target company have standing to assert the interests of its shareholders in a suit to enjoin a tender offer in violation of the All Holders Rule?*

The Supreme Court has held that "the sole purpose of the Williams Act" is to protect "target [company] shareholder[s]." *Chris-Craft*, 430 U.S. at 35. As explained above, the Court has also held that one of the "several factors [that] are relevant" in "determining whether a private remedy is implicit in a statute not expressly providing one" is whether the plaintiff is "'one of the class for whose *especial* benefit the statute was enacted.'" *Cort v. Ash*, 422 U.S. 66, 78 (1975) (quoting *Texas & Pacific Railway v. Rigsby*, 241 U.S. 33, 39 (1916) (emphasis added)). In view of these factors there can be no doubt that shareholders injured by a tender offer in violation of the Rule have standing to sue the tender offeror for either monetary or injunctive relief. No reported decision, however, has discussed the question whether a target company has standing to seek to enjoin a tender offer in violation of the All Holders Rule.[6] We find the question a difficult one.

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6. Polaroid cites *Rondeau v. Mosinee Paper Corp.*, 422 U.S. 49 (1975), as standing for the proposition that target corporations can assert Williams Act violations in a suit against the acquiror. We read the opinion, however, as not reaching the private cause of action or standing questions, which are never discussed, but instead as addressing only the question whether a showing of irreparable harm is necessary for a private litigant to obtain

We first discuss the constitutional facet of the standing requirement. The Constitution requires that a plaintiff "allege personal injury fairly traceable to the defendant's allegedly unlawful conduct and likely to be redressed by the requested relief." *Allen v. Wright*, 468 U.S. 737, 751 (1984). Polaroid has no problem in meeting this aspect of the standing requirement, as it is evident that Polaroid can reasonably determine that it will be injured by the successful conclusion of Shamrock's tender offer. *Cf. Unocal*, 493 A.2d at 954 (board of directors (of a Delaware corporation such as Polaroid) addressing a pending takeover bid "has an obligation to determine whether the offer is in the best interests of the corporation and its shareholders"); Bebchuk, *The Case for Facilitating Competing Tender Offers*, 95 Harv. L. Rev. 1028 (1982) (a successful bid by a tender offeror may foreclose a higher bid by a third party). The Supreme Court has also held that although a plaintiff must show injury to obtain standing, there is no constitutional requirement that the merits of the lawsuit directly relate to the plaintiff's injury. *See Duke*

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injunctive relief in a suit under § 13(d) of the Williams Act, 15 U.S.C. § 78m(d). Although one might infer the existence of a private right of action from a discussion concerning whether or not relief was available absent irreparable harm, the Court appeared to limit its holding to the question of an appropriate remedy. *Id.* at 62-63. Since *Rondeau* was handed down the same day as *Cort v. Ash*, 422 U.S. 66 (1975), the leading case on how to infer implied private rights of action, it seems unlikely that the Court would have held that an implied right of action arose out of § 13(d) without any discussion of the issue. A number of courts have similarly read *Rondeau* as not reaching the question of whether § 13(d) creates a private right of action. *See, e.g., Liberty Nat'l Ins. Holding Co. v. Charter Co.*, 734 F.2d 545, 560-61 (11th Cir. 1984); *Gateway Indust., Inc. v. Agency Rent A Car, Inc.*, 495 F. Supp. 92, 95 n.6 (N.D. Ill. 1980). Even if *Rondeau* stood for the proposition that a target corporation has standing to raise a claim under § 13(d), such a proposition would not necessarily establish that it has standing to raise a claim under the All Holders Rule.

*Power Co. v. Carolina Environmental Study Group*, 438 U.S. 59, 78 (1978).

Polaroid thus meets the constitutional requirements of standing. The Supreme Court, however, has held that the sole purpose of the Williams Act is to protect target company shareholders. In raising a claim under the Williams Act, Polaroid is therefore seeking to vindicate not its own rights but the rights of its shareholders. The issue in this case is consequently whether Polaroid has "third party" or "*jus tertii*" standing to assert the right of Polaroid shareholders to a tender offer that does not violate the All Holders Rule. *See generally* Monaghan, *Third Party Standing*, 84 Colum. L. Rev. 277 (1984); Sedler, *The Assertion of Constitutional* Jus Tertii: *A Substantive Approach*, 70 Calif. L. Rev. 1308 (1982); C. Wright, A. Miller, & E. Cooper, 13 *Federal Practice and Procedure* § 3531.9 (1984).

One context in which the Supreme Court has freely allowed *jus tertii* standing is when an association raises the rights of its members. Trade associations, public interest groups and other such associations have been permitted, for example, to challenge federal agency rules under the Administrative Procedure Act's judicial review provision, despite the language of the provision, which merely states that "[a] person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof." 5 U.S.C. § 702. *See National Motor Freight Traffic Association v. United States*, 372 U.S. 246, 247 (1963) (per curiam); *Sierra Club v. Morton*, 405 U.S. 727, 739 (1972); *Simon v. Eastern Kentucky Welfare Rights Organization*, 426 U.S. 26, 40 (1976); *Japan Whaling Association v. American Cetacean Society*, 478 U.S. 221, 230-31 n.4 (1986). *Sierra Club* described this doctrine as an example of a more general

principle that "an organization whose members are injured may represent those members in a proceeding for judicial review." 405 U.S. at 739.

Organizations raising constitutional challenges brought under 42 U.S.C. § 1983 have also been allowed to gain standing by asserting the interests of their members. The Court has formulated the doctrine as follows:

> an association has standing to bring suit on behalf of its members when ... (a) its members would otherwise have standing to sue in their own right; (b) the interests it seeks to protect are germane to the organization's purpose; and (c) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit.

*Hunt v. Washington State Apple Advertising Commission*, 432 U.S. 333, 343 (1977).

If Polaroid fit within the contours of this *jus tertii* associational standing doctrine, we could hold that it had standing to raise the rights of its shareholders, who can sue under the All Holders Rule, and thus itself sue under the Rule. Weighing in favor of allowing such standing is that while individual shareholders may often find the cost of the litigation beyond their means, the target corporation will usually have the resources to finance it, and, in many cases, this will have the salutary effect of enforcing the securities laws. A number of considerations, however, weigh against allowing the corporation *jus tertii* standing to represent the interests of its shareholders based on associational standing.

The interest that a corporation would be vindicating in such a suit is the right of some of its shareholders to sell at a price equal to that of other of its shareholders to a third party, the tender offeror.

This is an interest different in kind from that pursued in a corporation's ordinary litigation, which seeks to protect the corporation's business. Shareholders in a widely traded corporation such as Polaroid are generally free to sell their stock on any terms that they wish without interference from the corporation. While shareholders band together to form an organization with a single management to run a business, this endeavor does not normally include protecting shareholders in their relationships with third parties. It is thus doubtful whether "the interests" that Polaroid "seeks to protect" in its litigation under the All Holders Rule "are germane to the organization's purpose." *Hunt*, 432 U.S. at 343. *See* C. Wright, A. Miller, & E. Cooper, 13 *Federal Practice and Procedure* § 3531.9 at 617 ("The greatest care [in extending association standing] ... should be taken with organizations that ordinarily would not be expected to undertake litigation on behalf of their constituents. An ordinary commercial corporation, for example, generally should not be permitted to borrow standing from injured stockholders.").

In addition to this concern, the inherent conflicts of interest in litigation under the All Holders Rule may make a corporation a poor representative of shareholder interests. Although an association may rely on the standing of its members to assert standing for itself by showing that only one of its members has the type of redressable injury that would give it standing to sue individually, *Warth v. Seldin*, 422 U.S. 490, 511 (1975), associational standing has never been granted in the presence of serious conflicts of interest either among the members of an association or between an association and its members.

The first potential conflict is between those shareholders who view litigation to enjoin a tender offer as adversely affecting their opportunity to collect

on the tender offer premium and those shareholders who are cut out of the tender offer and thus may want to see it defeated. Even though some shareholders are disadvantaged by their exclusion from the tender offer, a great majority of shareholders will often benefit from the offer. A corporation is thus an uncertain representative for the interests of the disadvantaged shareholders, as it may have an eye to protecting the interests of the majority. This undermines the basis for *jus tertii* standing -- that the *jus tertii* advocate will vigorously assert the interests of the right-holder. *See Craig v. Boren*, 429 U.S. 190, 194 (1976); *Singleton v. Wulff*, 428 U.S. 106, 114 (1976) (plurality opinion). Indeed, one basis for the *constitutional* requirement that a litigant have a personal stake in a litigation is "to assure that concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for illumination of difficult ... questions." *Simon v. Eastern Kentucky Welfare Right Organization*, 426 U.S. 26, 38 n.16 (1976) (quoting *Baker v. Carr*, 369 U.S. 186 (1962)).

The second conflict of interest that may interfere with the proper conduct of the litigation in some cases is that between the management of a corporation and its shareholders. Even shareholders injured by their exclusion from a tender offer may sometimes profit handsomely from the tender offer and be injured by litigation that defeats it. The market price of the stock of a corporation jumps skyward within minutes after a credible tender offer is made. Excluded holders of the security can thus profit from the tender offer by selling their shares at the market price to third parties. If the excluded holders fail to sell to third parties, they still have the shares they started out with when the tender offer closes; in this sense they are no worse than if there had been no tender offer. Indeed, they may be better off since they now have a suit for damages

against the tender offeror who excluded them from the tender offer.

While shareholders (including those excluded from the offer) thus have a reason to react favorably to many tender offers, those in control of the target corporation have a natural incentive to resist a corporate takeover. Unless protected by "golden parachutes" guaranteeing them a lucrative exit from corporate affairs, the corporation's top officers may suffer a substantial loss in future earnings if the tender offer is successful. As Polaroid's home state of Delaware has recognized, measures adopted to ward off a takeover raise "the omnipresent specter that a board may be acting primarily in its own interests, rather than those of the corporation and its shareholders ...." *Unocal*, 493 A.2d at 954.[7]

The mere presence of a conflict of interest does not, of course, prove that management's hostile reaction to a tender offer is not in the best interests of shareholders. Indeed, Delaware law requires that a board addressing a pending takeover bid "to determine whether the offer is in the best interests of the corporation and its shareholders." *Unocal*, 493 A.2d at 954. Nevertheless, the presence of a genuine conflict of interest in many takeover situations weighs heavily against allowing corporations to assert the rights of

7. While those who manage the corporation have a fiduciary duty to respond to takeovers in the best interests of the corporation's shareholders, this legal duty may only limit the extent to which the disparate interests of management and shareholders affect managerial behavior. *See generally Edgar v. Mite Corp.*, 457 U.S. 624, 643-44 (1982) (describing welfare and incentive effects of corporate takeovers); E. Herman, *Corporate Control, Corporate Power* (1981); Easterbrook & Fischel, *The Proper Role of a Target's Management in Responding to a Tender Offer*, 94 Harv. L. Rev. 1161 (1981); Lowenstein, *Pruning Deadwood in Hostile Takeovers: A Proposal for Legislation*, 83 Colum. L. Rev. 249 (1983).

shareholders under an associational *jus tertii* standing theory.

For all the foregoing reasons, it would appear that Polaroid does not fit within the confines of the associational standing *jus tertii* doctrine.[8]

We nonetheless consider a number of possible counterarguments to the conclusion that a target corporation does not have *jus tertii* standing to assert

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8. We note that under the doctrine of *jus tertii*, standing has also been freely extended outside of the association context. In *Craig v. Boren*, 429 U.S. 190 (1976), for example, a beer vendor brought suit challenging the constitutionality of an Oklahoma law that prohibited selling beer to males under age 21 and females under age 18. The Court held that the vendor had *jus tertii* standing to raise the equal protection rights of males 18-20 years of age. The Court reasoned that not allowing "vendors and those in like positions ... [to] act[ ] as advocates of the rights of third parties who seek access to their market" would ensure that "'enforcement of the challenged restriction against the [vendor] would result indirectly in the violation of third parties' rights.'" *Id.* at 195 (quoting *Warth*, 422 U.S. at 510).

Applying *Craig* to the instant case, one could argue that Polaroid is a vendor of its stock and its shareholders are the vendees. The argument fails, however, because the cases allowing vendors to raise the rights of their vendees (or lessors the rights of their lessees, *Village of Belle Terre v. Boraas*, 416 U.S. 1 (1974), or doctors the rights of their patients, *Singleton*, 428 U.S. 106) all involve a litigation in which the merits of the suit involve the legitimacy of a restriction on the relationship between the vendor and the vendee. This is not the case here. Polaroid is not trying to object to any interference with its ability, for example, to sell stock or distribute dividends or proxies to its shareholders. Rather, Polaroid is objecting to the unequal treatment of its shareholders by a third party. Thus Polaroid and its shareholders do not necessarily have a unity of interest in the litigation, as it does not challenge an interference with their mutual freedom to interact. Nor is Polaroid the "obvious claimant," *Craig*, 429 U.S. at 197, since a violation of the All Holders Rule does not directly interfere with Polaroid's interaction with its stockholders. In addition, the conflict of interest problems discussed in text above in the associational standing context apply here as well.

the interests of its shareholders under the All Holders Rule.

Polaroid has asserted that "[t]he public interest is ... clearly in favor of the enforcement of the securities laws." Appellant's Brief at 37. Unfortunately, this facile assertion does not take us too far. It fails to consider whether such relief will result in an enforcement level in excess of that desirable from a policy perspective or that contemplated by Congress. It also fails to consider the impact of such relief on any Congressional decision to entrust regulatory decisions to a centralized, specialized, and more politically accountable body such as the SEC rather than private litigants and the courts. Finally, it fails to consider the extent to which the social benefits of enforcement may be incommensurate with the social costs in light of the costs of the litigation to the parties and the judicial system, the cost of uncertainty imposed by the litigation on the capital markets, the cost of compliance, and the cost resulting from the possibility that the litigation may defeat the tender offeror's efforts to consummate what may be a socially beneficial transaction.[9] The text and legislative history of the Williams Act (and the administrative history of the All Holders Rule) are silent on the issue. As the foregoing demonstrates, any attempt to rely upon one's own conception of what would constitute good tender offer policy, in addition to being inappropriate, is too latent with difficulties to yield a definitive answer.

Rather than invoking policy arguments, it might be argued that, as in the implied right of action inquiry discussed above, a court should presume that Congress expected courts to continue to apply the *jus*

9. *See generally* Stewart and Sunstein, *supra*, 95 Harv. L. Rev. at 1289-1307; Frankel, *Implied Rights of Action*, 67 Va. L. Rev. 553, 570-85 (1981); R. Posner, *The Federal Courts: Crisis and Reform* 270-72 (1985).

*tertii* standing doctrine extant at the time Congress passed the legislation. This argument, however, is unlikely to be of any help to Polaroid, as the *jus tertii* doctrine was no more liberal at the time that Congress passed the Williams Act. *See* Sedler, *supra*, 70 Calif. L. Rev. at 1308-09.[10]

As explained *infra* Typescript at 37, this Court has held that target corporations have standing to raise a claim under section 14(e) that the tender offer contains fraudulent misrepresentations or omissions. The best argument for allowing target corporations standing to sue under the All Holders Rule may thus be that there is no reason to distinguish All Holders Rule standing from misrepresentation standing. There is, however, a reason to draw this distinction. The bar against misrepresentation is meant to protect all shareholders. Shareholder litigation under the aegis of the corporation makes greater sense in this context, where the class of persons whose rights the corporation is vindicating constitutes all of its shareholders. The All

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10. That *Borak*, 377 U.S. at 431-33, allowed shareholder derivative suits to vindicate shareholder rights under § 14(a) of the Exchange Act (regulating proxies) is not to the contrary. Although technically brought as a suit by the corporation, the shareholder derivative suit is, in substance, not a corporate suit against a third party but a shareholder suit against those in control of the corporation. The inference that the Congress that passed the Williams Act intended to allow target corporations to sue in situations such as the All Holders Rule is weak at best. Moreover, the Court stated in *Borak* that "[t]he injury which a stockholder suffers from corporate action pursuant to a deceptive proxy solicitation ordinarily flows from the damage done the corporation, rather than from the damage inflicted directly upon the stockholder." 377 U.S. at 432. This is precisely the opposite of the All Holders situation, where the damage is done to the excluded stockholder individually in a tender offer that may generally benefit other stockholders. *See Chris-Craft*, 430 U.S. at 32 n.21 (emphasizing that *Borak* involved injury to shareholders as a group rather than shareholders individually).

Holders Rule, by contrast, protects what are likely to be only a minority of shareholders. Moreover, it may be more difficult to detect fraud than to detect violations of the All Holders Rule, and the possibility of irreparable harm may be greater in the case of fraud because of the greater difficulty in computing monetary loss. The need for target corporation standing in the fraud context may thus be greater than in the context of the All Holders Rule. Finally, the rule that target corporations have standing to sue for fraud was adopted by this Court without discussion; the Court simply reached the merits in such suits. While we do not question the continued efficacy of target corporation standing in fraud suits, the manner in which the rule was adopted should makes us hesitant to construe it as definitively settling the question of target corporation standing outside of the fraud context.

We therefore hold that, although the All Holders Rule creates a private right of action enabling injured shareholders to sue a tender offeror whose offer violates the Rule, a target corporation has no standing to sue under the Rule.[11] We thus affirm the district

11. Judge Cowen suggests in dissent that our conclusion with respect to target corporation standing under the All Holders Rule may be dicta because we enjoin the tender offer anyway on other grounds. Dissenting opinion, Typescript at 2 n.2. While it is true that we determine that Polaroid is entitled to injunctive relief under section 14(e), the injunctive relief that we grant under that section is very different from the injunctive relief that Polaroid would be entitled to if we determined that it had standing under the All Holders Rule (and that injunctive relief was appropriate on the basis of the Rule). Injunctive relief under section 14(e) merely halts the tender offer until corrective disclosure is made. This could be done in a few days or less, allowing the tender offer to proceed as before. Injunctive relief under the All Holders Rule, by contrast, would require Shamrock to restructure its tender offer to include the Polaroid ESOP shares. Thus resolution of the All Holders Rule standing issue has a direct effect on the relief that we grant and cannot be considered dicta.

court's refusal to grant a preliminary injunction on the basis of Polaroid's All Holders Rule claim.

### C. *Matters for Consideration in the Remanded Proceeding*

Because we hold that Polaroid does not have standing to raise a claim under the All Holders Rule, we do not determine the merits of the district court's denial of Polaroid's motion for a preliminary injunction on this issue. The All Holders issue is, however, unlikely to disappear from this case for long. The case will perforce return to the district court for further proceedings, and since the Polaroid ESOP, as a shareholder of the target corporation, has standing to raise an All Holders claim, see discussion *supra* Typescript at 20, and since it may well have not done so on the assumption that Polaroid's litigation would vindicate its interest, it seems likely that the Polaroid ESOP (or an ESOP shareholder with a vested right) may seek leave to intervene as a party plaintiff asserting a violation of the Rule as a basis to enjoin Shamrock's tender offer. We thus believe that it will be useful to make several observations for the benefit of the district court that bear upon the contention that Shamrock's tender offer violates the All Holders Rule.

The district court held that the "*particular facts of this case*" allow Shamrock to exclude the Polaroid ESOP shares from its tender offer. Dist. Ct. Op. at 12. The "particular circumstances" to which the district court was referring is the litigation in the Delaware Chancery Court and the stated intention to amend the offer. This strikes us as a frail reed upon which to rest a decision. Particularly in view of the strength of Polaroid's All Holders Rule violation claim, the district court's exception would swallow the rule.[12]

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12. We also note that the merits of the Shamrock's contention that the Polaroid ESOP shares are invalid have never been

## DOCUMENT N

**Order of United States Court of Appeals for the Third Circuit Denying the Petition for Rehearing *en Banc*, Dated October 20, 1988**

UNITED STATES COURT OF APPEALS
For the Third Circuit

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No. 88-5249

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JAMES MOODY, Trustee of the Estate of JEANNETTE CORPORATION, and THE COMMITTEE OF UNSECURED CREDITORS OF JEANNETTE CORPORATION,

and

ROBERT J. CINDRICH, Esquire, MANSMANN CINDRICH & TITUS, DOUGLAS A. CAMPBELL, Esquire, and CAMPBELL & LEVINE,

*Petitioners,*

v.

THE HONORABLE PAUL A. SIMMONS, United States District Judge for the Western District of Pennsylvania,

*Nominal Respondent,*

and

SECURITY PACIFIC BUSINESS CREDIT, INC., THE COCA COLA BOTTLING COMPANY OF NEW YORK, INC., KNY DEVELOPMENT CORPORATION, J. CORP., JOHN P. BROGAN, JOHN J. BROGAN, HANLEY DAWSON, Jr.,

HANLEY DAWSON, III, JAMES A. McLEAN, JAMES R. WINOKER, ROBERT M. JANOWIAK, INTERDYNE, INC., MUENCH-KREUZER, CANDLE COMPANY, CANDLE COMPANY, CALVIN McCRACKEN and FRANK W. STOREY,

and

JEANNETTE CORPORATION t/a JEANNETTE GLASS, JOHN POLOJAC and AMERICAN FLINT GLASS WORKERS UNION OF NORTH AMERICA, LOCAL NO. 535,

*Respondents.*

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*SUR PETITION FOR PANEL REHEARING AND SUGGESTION FOR REHEARING IN BANC*

Present: GIBBONS, *Chief Judge*, SEITZ, HIGGINBOTHAM, SLOVITER, BECKER, STAPLETON, GREENBERG, HUTCHINSON, SCIRICA, and COWEN, *Circuit Judges.*

The petition for rehearing filed by Respondent, The Honorable Paul A. Simmons, United States District Judge, having been submitted to the judges who participated in the decision of this Court and to all the other available circuit judges in active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court in banc, the petition for rehearing is DENIED.

BY THE COURT,

Edward R. Becker
*Circuit Judge*

DATED: October 20, 1988

## STATUTE APPENDIX II—RELEVANT STATUTES

### Statute Exhibit No. 1



**§1112. Conversion or dismissal**

(a) The debtor may convert a case under this chapter [11 USCS §§1101 et seq.] to a case under chapter 7 of this title [11 USCS §§701 et seq.] unless—

(1) the debtor is not a debtor in possession;

(2) the case is an involuntary case originally commenced under this chapter [11 USCS §§1101 et seq.]; or

(3) the case was converted to a case under this chapter [11 USCS §§1101 et seq.] on other than the debtor's request.

(b) Except as provided in subsection (c) of this section, on request of a party in interest, and after notice and a hearing, the court may convert a case under this chapter [11 USCS §§1101 et seq.] to a case under chapter 7 of this title [11 USCS §§701 et seq.] or may dismiss a case under this chapter [11 USCS §§1101 et seq.], whichever is in the best interest of creditors and the estate, for cause, including—

(1) continuing loss to or diminution of the estate and absence of a reasonable likelihood of rehabilitation;

(2) inability to effectuate a plan;

(3) unreasonable delay by the debtor that is prejudicial to creditors;

(4) failure to propose a plan under section 1121 of this title [11 USCS §1121] within any time fixed by the court;

(5) denial of confirmation of every proposed plan and denial of additional time for filing another plan or a modification of a plan;

(6) revocation of an order of confirmation under section 1144 of this title [11 USCS §1144], and denial of confirmation of another plan or a modified plan under section 1129 of this title [11 USCS §1129];

(7) inability to effectuate substantial consummation of a confirmed plan;

(8) material default by the debtor with respect to a confirmed plan; and

(9) termination of a plan by reason of the occurrence of a condition specified in the plan.

(c) The court may not convert a case under this chapter [11 USCS §§1101 et seq.] to a case under chapter 7 of this title [11 USCS §§701 et seq.] if the debtor is a farmer or a corporation that is not a moneyed, business, or commercial corporation, unless the debtor requests such conversion.

(d) The court may convert a case under this chapter [11 USCS §§1101 et seq.] to a case under chapter 13 of this title [11 USCS §§1301 et seq.] only if—

(1) the debtor requests such conversion; and

(2) the debtor has not been discharged under section 1141(d) of this title [11 USCS §1141(d)].

(e) Notwithstanding any other provision of this section, a case may not be converted to a case under another chapter of this title unless the debtor may be a debtor under such chapter.

Statute Exhibit No. 2

11 USCS §348 Bankruptcy

**§348. Effect of conversion**

(a) Conversion of a case from a case under one chapter of this title [11 USCS §§101 et seq.] to a case under another chapter of this title [11 USCS §§101 et seq.] constitutes an order for relief under the chapter to which the case is converted, but, except as provided in subsections (b) and (c) of this section, does not effect a change in the date of the filing of the petition, the commencement of the case, or the order for relief.

(b) Unless the court for cause orders otherwise, in sections 701(a), 727(a)(10), 727(b), 728(a), 728(b), 1102(a), 1110(a)(1), 1121(b), 1121(c), 1141(d)(4), 1146(a), 1146(b), 1301(a), 1305(a), 1201(a), 1221, and 1228(a) of this title, "the order for relief under this chapter" in a chapter to which a case has been converted under section 706, 1112, 1307, or 1208 of this title means the conversion of such case to such chapter.

(c) Sections 342 and 365(d) of this title apply in a case that has been converted under section 706, 1112, 1307, or 1208 of this title, as if the conversion order were the order for relief.

(d) A claim against the estate or the debtor that arises after the order for relief but before conversion in a case that is converted under section 1112, 1307, or 1208 of this title, other than a claim specified in section 503(b) of this title, shall be treated for all purposes as if such claim had arisen immediately before the date of the filing of the petition.

(e) Conversion of a case under section 706, 1112, 1307, or 1208 of this title terminates the service of any trustee or examiner that is serving in the case before such conversion.

**Statute Exhibit No. 3**

**11 USCS §327** **Bankruptcy**

**§327. Employment of professional persons**

(a) Except as otherwise provided in this section, the trustee, with the court's approval, may employ one or more attorneys, accountants, appraisers, auctioneers, or other professional persons, that do not hold or represent an interest adverse to the estate, and that are disinterested persons, to represent or assist the trustee in carrying out the trustee's duties under this title [11 USCS §§101 et seq.]

(b) If the trustee is authorized to operate the business of the debtor under section 721, 1202, or 1108 of this title, and if the debtor has regularly employed attorneys, accountants, or other professional persons on salary, the trustee may retain or replace such professional persons if necessary in the operation of such business.

(c) In a case under chapter 7, 12, or 11 of this title, a person is not disqualified for employment under this section solely because of such person's employment by or representation of a creditor, unless there is objection by another creditor or the United States trustee, in which case the court shall disapprove such employment if there is an actual conflict of interest.

(d) The court may authorize the trustee to act as attorney or accountant for the estate if such authorization is in the best interest of the estate.

(e) The trustee, with the court's approval, may employ, for a specified special purpose, other than to represent the trustee in conducting the case, an attorney that has represented the debtor, if in the best interest of the estate, and if such attorney does not represent or hold any interest adverse to the debtor or to the estate with respect to the matter on which such attorney is to be employed.

(f) The trustee may not employ a person that has served as an examiner in the case.

**Statute Exhibit No. 4**

**28 USC §455. Disqualification of justice, judge, or magistrate**

(a) Any justice, judge, or magistrate of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned.

**Statute Exhibit No. 5**

**28 USC Sec. 144**

**§144. Bias or prejudice of judge**

Whenever a party to any proceeding in a district court makes and files a timely and sufficient affidavit that the judge before whom the matter is pending has a personal bias or prejudice either against him or in favor of any adverse party, such judge shall proceed no further therein, but another judge shall be assigned to hear such proceeding.

The affidavit shall state the facts and the reasons for the belief that bias or prejudice exists, and shall be filed not less than ten days before the beginning of the term

at which the proceeding is to be heard, or good cause shall be shown for failure to file it within such time. A party may file only one such affidavit in any case. It shall be accompanied by a certificate of counsel of record stating that it is made in good faith.

**Statute Exhibit No. 6**

**The Attorney General**

**28 USC Sections 516, 517, 518, 519**

**6(a)**

**§516. Conduct of litigation reserved to Department of Justice**

Except as otherwise authorized by law, the conduct of litigation in which the United States, an agency, or officer thereof is a party, or is interested, and securing evidence therefor, is reserved to officers of the Department of Justice, under the direction of the Attorney General.

**6(b)**

**§517. Interests of United States in pending suits**

The Solicitor General, or any officer of the Department of Justice, may be sent by the Attorney General to any State or district in the United States to attend to the interests of the United States in a suit pending in a court of the United States, or in a court of a State, or to attend to any other interest of the United States.

6(c)

**§518. Conduct and argument of cases**

(a) Except when the Attorney General in a particular case directs otherwise, the Attorney General and the Solicitor General shall conduct and argue suits and appeals in the Supreme Court and suits in the United States Claims Court or in the United States Court of Appeals for the Federal Circuit and in the Court of International Trade in which the United States is interested.

(b) When the Attorney General considers it in the interests of the United States, he may personally conduct and argue any case in a court of the United States in which the United States is interested, or he may direct the Solicitor General or any officer of the Department of Justice to do so.

6(d)

**§519. Supervision of litigation**

Except as otherwise authorized by law, the Attorney General shall supervise all litigation to which the United States, an agency, or officer thereof is a party, and shall direct all United States attorneys, assistant United States attorneys, and special attorneys appointed under section 543 of this title in the discharge of their respective duties.

**Statute Exhibit No. 7**

**The Supreme Court**

**28 USC Sec. 1254**

**§1254. Courts of appeals; certiorari; appeals; certified questions**

Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:

(1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree;

**Statute Exhibit No. 8**

**District Court's Jurisdiction**

**28 USC Sec. 1331**

**§1331. Federal question**

The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States.

**Statute Exhibit No. 9**

**Judicial Procedure**

**28 USC Sec. 1651(a)**

**§1651. Writs**

**(a)** The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law.

## Statute Exhibit No. 10

## Rules of Appellate Procedure

### Rule 21. Writs of Mandamus and Prohibition Directed to a Judge or Judges and Other Extraordinary Writs

**(a) Mandamus or Prohibition to a Judge or Judges; Petition for Writ; Service and Filing.** Application for a writ of mandamus or of prohibition directed to a judge or judges shall be made by filing a petition therefor with the clerk of the court of appeals with proof of service on the respondent judge or judges and on all parties to the action in the trial court. The petition shall contain a statement of the facts necessary to an understanding of the issues presented by the application; a statement of the issues presented and of the relief sought; a statement of the reasons why the writ should issue; and copies of any order or opinion or parts of the record which may be essential to an understanding of the matters set forth in the petition. Upon receipt of the prescribed docket fee, the clerk shall docket the petition and submit it to the court.

(3)

Supreme Court, U.S.
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CLERK

No. 88-1174

# In the Supreme Court of the United States

**October Term, 1988**

THE HONORABLE PAUL A. SIMMONS, United States District Judge for the Western District of Pennsylvania
*Pro Se Petitioner,*

v.

JAMES MOODY, Trustee of the Estate of JEANNETTE CORPORATION, et al.,
*Respondents.*

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

## BRIEF FOR RESPONDENTS IN OPPOSITON

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## COUNTERSTATEMENT OF QUESTION PRESENTED

1. Whether this Court should review the Third Circuit's issuance of a writ of mandamus compelling a district court judge (the petitioner herein) to vacate (a) unsubstantiated findings impugning the integrity of counsel and (b) other substantive, "non-housekeeping" orders, all of which were made or entered after said judge had acknowledged that his impartiality could reasonably be questioned and had repeatedly announced his intention to recuse himself.

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## COUNTERSTATEMENT OF THE CASE

The "Statement of the Case" set forth in the Petition does not comply with this Court's Rule 21.1(g)[1], which calls for a "concise statement . . . containing the facts material to the consideration of the questions presented". It is so replete with argument that it is difficult to distinguish between the "Statement of the Case" and the following section of the Petition entitled "Reasons for Granting the Writ", in which argument is permitted.

Moreover, petitioner's "Statement of the Case" contains scores of so-called facts which are anything but "true and undisputed". Among other things, petitioner repeats the numerous unfounded allegations about respondents Robert J. Cindrich, Esquire and Douglas A. Campbell, Esquire which precipitated the filing of the petition for writ of mandamus in the court below. With regard to these allegations, the Third Circuit observed, "[W]e have examined the record and note that we can find no justification for the district judge's disparaging statements about the petitioners, which he repeats in his papers presented to this Court". *Moody v. Simmons,* 858 F.2d. 137, 144 (3d Cir. 1988). Appendix to Petition (hereinafter "App.") at 21a.

---

[1]Similarly, the section of the Petition entitled "The Parties" is contrary to Rule 21.1(b). As petitioner correctly notes at page ii, the caption of the case in this Court contains the names of all of the parties to the proceeding below. The remaining five pages of that section of the Petition are not only superfluous, but also contain improper argument and numerous inaccurate or misleading statements concerning the parties and their respective roles in this matter.

Pursuant to Rule 28.1, none of the respondents on whose behalf this Brief in Opposition is filed is a corporation.

To respond to all of the inaccurate statements and omissions contained in petitioner's "Statement of the Case" would require that this brief be extended beyond its allowed length. Accordingly, without being taken to acquiesce in those assertions, respondents incorporate herein by reference the facts as set forth in the Third Circuit's opinion.

## SUMMARY OF ARGUMENT

None of the considerations governing review on certiorari, as set forth in this Court's rules, supports the granting of the requested writ.

The issue presented to and decided by the Third Circuit was not, as petitioner erroneously suggests, whether the underlying bankruptcy case should be converted from a Chapter 11 to a Chapter 7. Rather, the issue before that court was whether substantive actions taken by a district court judge—after he had acknowledged that his impartiality could reasonably be questioned and had repeatedly announced his intention to recuse himself—should be set aside.

The Third Circuit's holding is not in conflict with any of the cases cited in the Petition, nor with any other cases of which respondents are aware. Because there are no other special and important reasons to review the decision of the court below, the Petition should be denied.

## ARGUMENT

### I. THE INSTANT CASE IS UNWORTHY OF REVIEW BY THIS COURT.

The Third Circuit's decision in this case is consistent with established law and does not present any questions

the resolution of which would have immediate importance beyond the particular facts and parties involved. Accordingly, no purpose would be served by review in this Court.

**A. The Third Circuit's opinion does not conflict with any pertinent decisions of this Court or other courts of appeal.**

Much of the Petition is based on the erroneous assumption that the mandamus proceeding below was, in reality, a collateral attack on petitioner's so-called "conversion order". This clearly was not the case.

The Third Circuit was not asked to and did not address whether the underlying bankruptcy case should be converted from a Chapter 11 to a Chapter 7. The issue with which the Third Circuit properly concerned itself was whether *any* non-ministerial actions should have been taken after petitioner determined that circumstances necessitated recusal. Deferring to petitioner's finding that recusal was required, the Third Circuit correctly held that petitioner should have recused himself at that time—not two months later, after issuing orders and findings far too substantial to be considered mere "housekeeping". App. 17a-19a.

Petitioner's repeated assertions to the contrary notwithstanding, the Third Circuit's opinion does not conflict with any applicable decisions issued by this Court or other courts of appeal. In fact, only two of the cases cited in the Petition—*United States v. Murphy,* 768 F.2d 1518 (7th Cir. 1985), *cert. denied,* 475 U.S. 1012 (1986), and *Liljeberg v. Health Services Acquisition Corp.,* 108 S.Ct. 2194 (1988)—even address the subject of recusal under 28 U.S.C. §455(a). Neither of these cases is contrary to the case *sub judice.*

*United States v. Murphy*—a criminal case in which the defendant waited until after he had been convicted and sentenced to file a Section 455(a) motion for recusal—is so obviously distinguishable as to render petitioner's assertion of "conflict" untenable. Unlike Murphy, who argued that the judge's actions *prior* to being asked to recuse should be nullified, the mandamus petitioners below sought only to vacate actions taken *after* the judge himself acknowledged that recusal was required.

In *Liljeberg,* this Court affirmed the decision of the court of appeals, which vacated a judgment on the ground that a judge should have disqualified himself when he first became aware of circumstances creating an appearance of partiality. Noting that 28 U.S.C. §455(a) "neither prescribes nor prohibits any particular remedy for a violation of [a judge's duty to disqualify himself]", this Court explained:

> Congress has wisely delegated to the judiciary the task of fashioning remedies that will best serve the purpose of the legislation. In considering whether a remedy is appropriate, we do well to bear in mind that in many cases—and this is such an example—the Court of Appeals is in a better position to evaluate the significance of a violation than is this Court. Its judgment as to the proper remedy should thus be afforded our due consideration.

108 S.Ct. at 2203.

Perhaps the most baseless argument advanced by petitioner is that the Third Circuit in *Polaroid Corp. v. Disney,* 862 F.2d 987 (3d Cir. 1988), "has already reversed the law in the case at bar, in less than six weeks . . . " Petition at 19-20. In *Polaroid,* the Third Circuit affirmed in part and reversed in part a district court's denial of a preliminary

injunction, holding that the target of a corporate takeover attempt had satisfied the requirements for injunctive relief on its misrepresentation claim under §14(e) of the Williams Act, but did not have standing to assert a violation of the Security and Exchange Commission's All Holders Rule. *Id.* at 989-90. That decision obviously does not reverse, conflict with, or have any bearing whatsoever on the decision in the instant case.

Petitioner seeks to find conflicts where none in fact exists. Certiorari should be denied because the Third Circuit's opinion is wholly consistent with this Court's decision in *Liljeberg* and does not conflict with any pertinent decisions of the Third Circuit or other courts of appeal.

**B. There are no other special and important reasons for granting a review on writ of certiorari.**

The matter *sub judice* stems from an unfortunate, but not unprecedented, clash between a district court judge and attorneys who appeared before him. The Third Circuit's issuance of a writ of mandamus—compelling that judge to vacate unsupported remarks impugning the integrity of counsel and other substantive actions, all of which were made or taken after the judge himself had repeatedly acknowledged that his impartiality could reasonably be questioned—was entirely proper and has no significant ramifications beyond the immediate interests of the parties involved.

The final "reason" which petitioner advances for granting the requested writ is that is it unethical for the law firm of Mansmann Cindrich & Titus (formerly Mansmann Cindrich & Huber) to be involved in this case—or in any other bankruptcy-related case pending in the Third Circuit Court of Appeals or any district courts or bankruptcy

courts within said Circuit—because J. Jerome Mansmann, Esquire, a partner in the firm, is married to Third Circuit Judge Carol Los Mansmann. Petitioner further suggests that all of the other judges on the Third Circuit should have disqualified themselves from ruling on the mandamus petition because of Judge Mansmann's alleged "direct financial involvement in this case, suggested by her husband's law firm's admitted vested interest[2] in a potential twelve million dollar legal fee." Petition at 26-27.

There is no basis for either assertion. No statute, rule of court, code of judicial conduct, or rule of professional conduct prohibits spouses of federal circuit or district court judges from appearing as counsel in bankruptcy or bankruptcy-related cases. Nor is there any such authority which requires the recusal of an entire circuit court simply because the spouse of one member of that court is involved in a case.

When the district court action arose in 1983, the firm of Mansmann Cindrich & Huber sought from the Honorable Ruggero J. Aldisert (then Chief Judge of the Third Circuit Court of Appeals and former chairman of the Advisory Committee on Bankruptcy Rules) an opinion whether the firm could properly serve as counsel in view of Bankruptcy Rule 5002, which at that time prohibited the appointment or employment of "a relative of any judge of

[2]The "admitted vested interest" to which petitioner refers is nothing more than the court approved contingent fee arrangement. Although a contingent fee agreement gives a lawyer a financial interest in the outcome of a case, that interest is not "adverse to the estate" within the meaning of 11 U.S.C. §327, as petitioner wrongly suggests at page 20 of the Petition. On the contrary, there is nothing improper about a contingent fee arrangement. *See, e.g.*, Model Rules of Professional Conduct Rule 1.5(c) (1983); Model Code of Professional Responsibility DR 5-103(A)(2), EC 2-20 and EC 5-7 (1979). (Pertinent portions of these provisions are set forth in the Appendix to this Brief at A-2-A-4.)

the court making the appointment or approving the employment . . . "

In response, Chief Judge Aldisert forwarded to Mansmann Cindrich & Huber a copy of an opinion letter which he had recently sent to another law firm dealing with the same question. After reviewing that letter, Mansmann Cindrich & Huber was fully satisfied that it was not barred from serving as counsel.[3]

Although the situation which has developed in this case is regrettable, no issues are presented which are of such general interest or importance as would warrant review by this Court.

---

[3]Any doubt that may have existed about the issue was put to rest in 1985, when Bankruptcy Rule 5002 was amended to prohibit only the appointment or employment of an individual who "is a relative of *the bankruptcy judge* making the appointment" (rather than "a relative of any judge of the court making the appointment"). (Bankruptcy Rule 5002, and Bankruptcy Rule 5002(a) as amended April 29, 1985, are set forth in the Appendix to this Brief at A-1.)

## CONCLUSION

For the reasons set forth above, the Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit should be denied.

Respectfully submitted,

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# APPENDIX

## I. Bankruptcy Rule 5002 (1983), 11 U.S.C.

No person may be appointed as a trustee or examiner or be employed as an attorney, accountant, appraiser, auctioneer, or other professional person pursuant to §327 or §1103 of the Code if (1) the person is a relative of any judge of the court making the appointment or approving the employment or (2) the person is or has been so connected with any judge of the court making the appointment or approving the employment as to render such appointment or employment improper. Whenever under this rule a person is ineligible for appointment or employment, the person's firm, partnership, corporation, or any other form of business association or relationship, and all members, associates and professional employees thereof are also ineligible for appointment or employment.

## II. Bankruptcy Rule 5002(a) (eff. August 1, 1985), 11 U.S.C.

(a) Appointment of Relatives Prohibited. No individual may be appointed as a trustee or examiner or be employes as an attorney, accountant, appraiser, auctioneer, or other professional person pursuant to §327 or §1103 of the Code if the individual is a relative of the bankruptcy judge making the appointment or approving the employment. Whenever under this subdivision an individual is ineligible for appointment or employment, the individual's firm, partnership, corporation, or any other form of business association or relationship, and all members,

associates and professional employees thereof are also ineligible for appointment or employment.

## III. Model Code of Professional Responsibility (1979)

DR 5-103 Avoiding Acquisition of Interest in Litigation.

(A) A lawyer shall not acquire a proprietary interest in the cause of action or subject matter of litigation he is conducting for a client, except that he may:

* * *

(2) Contract with a client for a reasonable contingent fee in a civil case.

EC 2-20 Contingent fee arrangements in civil cases have long been commonly accepted in the United States in proceedings to enforce claims. The historical bases of their acceptance are that (1) they often, and in a variety of circumstances, provide the only practical means by which one having a claim against another can economically afford, finance, and obtain the services of a competent lawyer to prosecute his claim, and (2) a successful prosecution of the claim produces a *res* out of which the fee can be paid. Although a lawyer generally should decline to accept employment on a contingent fee basis by one who is able to pay a reasonable fixed fee, it is not necessarily improper for a lawyer, where justified by the particular circumstances of a case, to enter into a contingent fee contract in a civil case with any client who,

after being fully informed of all relevant factors, desires that arrangement. Because of the human relationships involved and the unique character of the proceedings, contingent fee arrangements in domestic relation cases are rarely justified. In administrative agency proceedings contingent fee contracts should be governed by the same considerations as in other civil cases. Public policy properly condemns contingent fee arrangements in criminal cases, largely on the ground that legal services in criminal cases do not produce a *res* with which to pay the fees.

EC 5-7 The possibility of an adverse effect upon the exercise of free judgment by a lawyer on behalf of his client during litigation generally makes it undesirable for the lawyer to acquire a proprietary interest in the cause of his client or otherwise to become financially interested in the outcome of the litigation. However, it is not improper for a lawyer to protect his right to collect a fee for his services by the assertion of legally permissible liens, even though by doing so he may acquire an interest in the outcome of litigation. Although a contingent fee arrangement gives a lawyer a financial interest in the outcome of litigation, a reasonable contingent fee is permissible in civil cases because it may be the only means by which a layman can obtain the services of a lawyer of his choice. But a lawyer, because he is in a better position to evaluate a cause of action, should enter into a contingent fee arrangement only in those

instances where the arrangement will be beneficial to the client.

## IV. Model Rules of Professional Conduct (1983)

RULE 1.5 FEES

* * *

(c) A fee may be contingent on the outcome of the matter for which the service is rendered, except in a matter in which a contingent fee is prohibited by paragraph (d) or other law. A contingent fee agreement shall be in writing and shall state the method by which the fee is to be determined, including the percentage or percentages that shall accrue to the lawyer in the event of settlement, trial or appeal, litigation and other expenses to be deducted from the recovery, and whether such expenses are to be deducted before or after the contingent fee is calculated. Upon conclusion of a contingent fee matter, the lawyer shall provide the client with a written statement stating the outcome of the matter and, if there is a recovery, showing the remittance to the client and the method of its determination.

(4)

Supreme Court, U.S.
FILED
FEB 23 1989
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# No. 88-1174

IN THE

# Supreme Court of the United States

October Term, 1988

THE HONORABLE PAUL A. SIMMONS, United States District Judge for the Western District of Pennsylvania,
*Pro Se Petitioner,*

vs.

JAMES MOODY, Trustee of the Estate of JEANNETTE CORPORATION, *et al.*,
*Respondents.*

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

## *PRO SE* PETITIONER'S REPLY TO THE FOLLOWING NAMED RESPONDENT'S BRIEF—JAMES MOODY, Trustee of the Estate of JEANNETTE CORPORATION, and THE COMMITTEE OF UNSECURED CREDITORS OF JEANNETTE CORPORATION, and ROBERT J. CINDRICH, Esquire, MANSMANN CINDRICH & TITUS, DOUGLAS A. CAMPBELL, Esquire, and CAMPBELL & LEVINE

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14

## Questions Presented for Review

1. Did James Moody, Trustee of the Estate of Jeannette Corporation and the Committee of Unsecured Creditors of Jeannette Corporation and their Attorneys, Robert J. Cindrich, Esquire of Mansmann Cindrich & Titus, and Douglas A. Campbell, Esquire of Campbell & Levine have "legal standing" to act as Petitioners in this bankruptcy case to petition for and obtain a Writ of Mandamus from the United States Court of Appeals for the Third Circuit, directed to this United States District Judge requiring him to vacate a certain "conversion order" which this said District Judge had entered in the above-captioned bankruptcy case?

2. Assuming *arguendo* that the said Mandamus Petitioners in this case had legal "standing" to initiate this Mandamus action, should a Writ of Mandamus be issued on the facts of this case?

3. Is it proper for the Court of Appeals to issue a Writ of Mandamus where it is both legally and physically impossible for the Respondent, United States District Judge to carry out the directive set forth in the writ?

4. Should your Honorable United States Supreme Court in the sound exercise of your inherent supervisory powers over inferior Federal Courts, bar the Law Firm of Mansmann, Cindrich & Titus (headed by Jerome Mansmann) from practicing bankruptcy law in the United States Bankruptcy Courts and bankruptcy law in the United States District Court of the Third Judicial Circuit of the United States for the reason that the Honorable Carol L. Mansmann, the wife of Jerome Mansmann, and as a Judge of the United States Court of Appeals for the Third Circuit, sits on the Court which appoints all Bankruptcy Judges sitting in said Third Judicial Circuit to 14 year terms of office?

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United States v. Murphy, 768 F.2d 1518 (7th Cir. 1985), *cert. denied*, 475 U.S. 1012 (1986) ..... 4,5,8

Statute:

28 U.S.C., Section 455 ..... 3,4,5,7

Other Authorities:

S. Rep. No. 93-419, 93 Cong., 1st Sess. 1973 ..... 7

IN THE

# Supreme Court of the United States

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**October Term, 1988**

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**No. 88-1174**

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THE HONORABLE PAUL A. SIMMONS,
United States District Judge for the
Western District of Pennsylvania,
*Pro Se Petitioner,*

vs.

JAMES MOODY, Trustee of the Estate of
JEANNETTE CORPORATION, *et al.*,
*Respondents.*

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ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT.

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## *PRO SE* PETITIONER'S REPLY TO THE FOLLOWING NAMED RESPONDENT'S BRIEF—JAMES MOODY, Trustee of the Estate of JEANNETTE CORPORATION, and THE COMMITTEE OF UNSECURED CREDITORS OF JEANNETTE CORPORATION, and ROBERT J. CINDRICH, Esquire, MANSMANN CINDRICH & TITUS, DOUGLAS A. CAMPBELL, Esquire, and CAMPBELL & LEVINE

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## Introduction

Respondents James Moody, The Committee of Unsecured Creditors, Robert J. Cindrich, Esq., Mansmann, Cindrich & Titus, Douglas A. Campbell, Esq. and Campbell & Levine have filed a "brief" in opposition to the granting of the Petition for a Writ of Certiorari in the above-captioned case.

This Petitioning Judge sadly and regrettably is compelled to state that said "brief" is a sorry reflection of greed and intellectual dishonesty at its worse.

Respondents at page one of their "brief" without citing one example in support of said statement, declare, "Moreover petitioner's 'Statement of the Case' contains scores of so-called facts which are anything but true and undisputed".

This intentionally false "scatter gun" statement by Respondents in their "brief" is a calculated attempt to mislead and divert your Honorable Supreme Court from addressing the genuine and vital issues at hand.

The real truth is that every relevant fact referred to by this Petitioning Judge, without exception, are historical facts which are established indisputably from the contents of the Docket Entries, and Official Court Records that have been filed in this case in the United States Bankruptcy Court for the Western District of Pennsylvania, the United States District Court for the Western District of Pennsylvania, and the United States Court of Appeals for the Third Circuit.

It is truly amazing that the Respondents should question the validity or underlying genuineness of the historical facts set forth in this Petitioner's "Statement of the Case", that are clearly and indisputably supported by the relevant Court records, since but with two general

exceptions, all of said facts were established directly from recorded papers and recorded hearing transcripts that were orchestrated and/or prepared and filed of record by the Respondent-Trustee and Respondent Attorneys in this case. The only two exceptions are (1) the recorded orders, statements and opinions of the various Courts, and (2) the two papers filed on behalf of the Unsecured Employee Creditors, namely, Document "I", 169a and Document "L", 181a.

Further, it is respectfully noted that the within Respondents have not and cannot pinpoint even one relevant fact used in this Petition for a Writ of Certiorari that is untrue.

It needs to be said that contrary to the insinuations of the Circuit Panel and the false statements in the Respondents' brief in this case, this Petitioning Judge bears no malice against these Respondents despite their flagrant unethical behavior as is clearly demonstrated by the very "conversion order" of this Petitioning Judge that triggered this matter now before your Honorable Supreme Court. In said "conversion order" this Judge reluctantly recommended that the Respondent-Trustee and all of the Respondent Attorneys should be reappointed to represent the Bankrupt Estate, but they were to be paid reasonable hourly fees (See Document C, 22a and 24a).

It is clear that the Respondents are not satisfied with reasonable fees, they want the potential of a twelve million dollar fee and the Circuit Panel has approved this callous exhibition of greed and unethical conduct.

## DISCUSSION OF THE FOUR ISSUES PRESENTED

### 1. The Matter of "Standing"

It seems that the legal strategy of the Respondents as well as the Third Circuit Panel is to completely ignore this issue of legal "standing" to litigate and hope that it somehow will go away without discussion.

This fundamental issue is discussed in full beginning at page 17, of the Petition. Suffice it to say that this is the first recorded case in American Judicial History where an Appeals Court has placed the personal financial interests of the attorneys and trustee (all of these Respondents), above the financial interests and wishes of the clients (*i.e.* the Unsecured Creditors of the Bankrupt), who, said Respondents, are duly obligated to fairly represent.

The "conversion order" of this Petitioning Judge directly or by operation of law removed all of the within Respondents from their representative duties with the Bankrupt Estate (See Document C, 22a) (These Respondents already have claimed professional fees and professional expenses as to this Bankrupt in an amount over one million dollars up to October 7, 1987, 55a).

These Respondents can be reappointed as Representatives of the Bankrupt Estate (and this Judge reluctantly has so recommended), but without the right to an unlawful 33% contingent fee order which could give these Respondents outrageous sums of money.

The practical effect of vacating the "conversion order" via the Writ of Mandamus is not to vindicate any public policy associated with Section 455(a), but is to restore these Respondents to their representative positions with the Bankrupt Estate with their unlawful 33% contingent

fee order which could mean a potential windfall for the Respondent Attorneys and the Respondent-Trustee (who also renders accounting services to the Estate) in excess of twelve million dollars to the financial detriment of all of the creditors and against the expressed wishes of the majority of the unsecured creditors.

**2. Assuming *Arguendo* that the Said Mandamus Petitioners in this Case had Legal "Standing" to Initiate this Mandamus Action a Writ of Mandamus Should not have been Issued on the Facts of this Case Against this Petitioner.**

This Petitioning Judge has relied on *United States v. Murphy*, 768 F.2d 1518 (7th Cir. 1985), *cert. denied*, 475 U.S. 1012 (1986), and *Liljeberg v. Health Services Acquisition Corp.*, 486 U.S. _____, 100 L. Ed 2d 855, 108 S. Ct. 2194 (1988).

The following facts are clearly indisputable in this case:

1. Not one real party with an interest in the Bankrupt's Estate and not one of the within Respondents have accused this Petitioning Judge of abusing his discretion when he entered the "conversion order" (Document C, 22a); and no interested party has admitted and/or contended on the record that they were in any way legally harmed by said "conversion order". See Circuit Panel Opinion, Document B, pages 1 and 18, 4a and 21a.

2. That no appeal of any kind was taken in regard to said "conversion order".

3. That no motion requesting this Petitioning Judge to recuse himself under Section 455(a) has ever been filed even to this date.

At page 4, of their "brief" the within Respondents attempt to distinguish the Murphy case which clearly and without ambiguity requires a motion to be filed in every case if a litigant wants a Judge to stand aside under Section 455(a), by making the following statement:

> "United States v. Murphy—a criminal case in which the defendant waited until after he had been convicted and sentenced to file a Section 455(a) motion for recusal—is so obviously distinguishable as to render petitioner's assertion of 'conflict' untenable. Unlike Murphy, who argued that the judge's actions prior to being asked to recuse should be nullified, the mandamus petitioners below sought only to vacate actions taken after the judge himself acknowledged that recusal was required."

The Respondents have not accurately set forth what this Petitioning Judge "acknowledged". On pages 13, and 14, of the Petition, this matter is discussed at length. Suffice it to say again that this Judge plainly and clearly said on the record that *none* of the matters then before this Judge which led to the issuance of the "conversion order" would require his recusal and that perhaps there would be matters *raised in the future that would require his recusal* but not as of January 29, 1988.

In any event, this issue of when recusal was to have taken place would not have occurred if the required motion had been made in this case.

There are many additional sound public policy reasons why a motion for recusal should be required, and why the *Murphy case cited supra* should be followed by your Honorable Supreme Court.

Multiple factors are to be considered by the Court on application for recusal.

The standard utilized in considering whether the Court should entertain recusal is whether a reasonably disinterested observer, knowing all the facts, would harbor doubts about the impartiality of the courts towards a party to the action. *Edelstein vs. Wilentz,* 812 F.2d 128, 131 (3rd Cir. 1987). *See also, Citron vs. Union Pacific Railroad Company,* 813 F.2d 917, 922 (9th Cir. 1987).

First, a Motion for Recusal is not to be liberally granted as the Court is presumed to be impartial. *United States v. Fiat Motors of North America, Inc.,* 512 F. Supp. 247 (DDC 1981).

Second, the Court has a continuing obligation not to recuse itself if the facts do not warrant a finding of prejudice against a party. *United States v. Baskes,* 687 F. 2d 165, 170 (7th Cir. 1981).

Third, the Court has a continuing obligation to serve if it believes itself free from prejudice against the party. *Moon vs. Winfield,* 368 F. Supp. 843 (SDNY, 1973).

Fourth. In making its determination, the Court should consider the burden it places on the other judges if it grants a Motion for Recusal. *Simnonson vs. General Motors Hospital,* 425 F. Supp. 574 (EDPA, 1976).

Fifth. A Judge should not be lulled into expending hundreds of hours of time on a case only to find belatedly after the resources of the Court have been wasted that there were known facts that would require a Judge's recusal.

Sixth. Litigants who have valid grounds for requiring recusal of a Judge should not be permitted to see whether the Judge rules against them prior to moving for the Judge's recusal.

Congress in passing 28 USC, Section 455 warned:

> In assessing the reasonableness of a challenge to his impartiality, each judge must be alert to avoid the possibility that those who would question his impartiality are, in fact, seeking to avoid the consequences of his expected adverse decision. Disqualification for lack of impartiality must have a reasonable basis. Nothing in this proposed legislation should be read to warrant the transformation of a litigant's fear that a judge may decide a question against him into a "reasonable fear" that the judge will not be impartial. Litigants ought not to have to face a judge where there is a reasonable question of impartiality, but they are not entitled to judges of their own choice.
>
> S. Rep. No. 93-419, 93 Cong., 1st Sess. 1973, p. 5.

Seventh. What is also important for the Court to consider is the timeliness of the recusal motion and a formal motion will give opposing counsel opportunity to address the recusal issue and also contest the facts alleged by the moving party in an appropriate manner.

The only practical, accurate and fair way of implementing the above-mentioned factors in considering applications for recusal is to require a formal motion and a hearing on the motion so there will not be, confusion as to the facts and where a Judge will be given written reasons for his proposed disqualification, so the Judge can properly consider said reasons and determine on the record whether the reasons given for recusal are valid or groundless.

Additionally, since the Third Circuit Panel itself found that the action of this Petitioning Judge was uncontested and no abuse of this Judge's discretion has been claimed by any interested party, said "conversion order" was at most harmless error and therefore the conflict

between this case at bar and *U.S. v. Murphy*, cited *supra*, and the recent United States Supreme Court case of *Liljeberg* (cited *supra*) would require that this Petition for Certiorari should be granted (See P. 24 of this Petition for a full discussion).

**3. Impossibility Issue**

The "brief" of the within Respondents does not address this issue. The Writ of Certiorari should certainly issue based on the ground that it is legally and physically impossible for this Judge to execute the Circuit Panel's direction to vacate the "conversion order", as discussed on page 24 of the Petition.

**4. Practice of Law Issue**

This Petitioner stands on the discussion of this issue beginning on page 26, of his Petition for a Writ of Certiorari.

## Conclusion

For the reasons heretofore set forth in this Judge's Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit, and for the reasons set forth in this Reply to the Respondents' brief in opposition to said Petition, it is respectfully requested that the Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit be granted.

Respectfully submitted,

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